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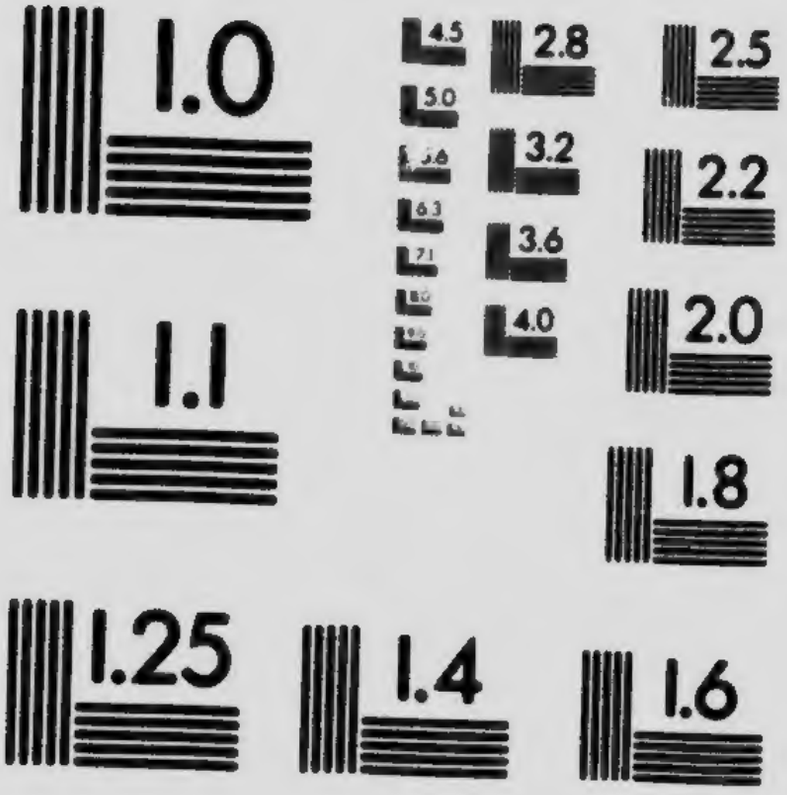

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AN ANALYSIS

OF

WILLIAMS

ON THE

LAW OF REAL AND PERSONAL PROPERTY

FOR THE USE OF STUDENTS.

BY

A. M. WILSHERE, M.A., LL.B.

Of Gray's Inn and the Western Circuit, Barrister-at-Law

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PREFACE.

THE only Preface necessary for a work of this description is a warning that it is designed merely as an assistance to the memory of the student who has read the parent work. It is a notebook and nothing more. In this edition I have added an analysis of the greater part of Williams on Personal Property; the bulk of the omissions consists of the sections relating to the law of contract which will be found in the Analysis of Contracts and Torts published in this series.[1]

A. M. W.

COURT, TEMPLE,
March, 1914.

[1] Analysis of Contracts and Torts, by A. M. Wilshere and Douglas Robb, published by Sweet & Maxwell, Ltd.

PART I.—REAL PROPERTY.

TABLE OF CONTENTS.

TABLE OF PRINCIPAL ABBREVIATIONS

St. or Sts.	Statute of or Statutes of.
Ct.	Court.
S. L. A.	Settled Land Act.
C. L.	Common Law.
p. a. v.	*pur autre vie.*
c. q. v.	*cestui que vie.*
c. q. t.	*cestui que trust.*
R. P. A.	Real Property Act.
C. A.	Conveyancing Act.
Ch. D.	Chancery Division.
W. A.	Wills Act.
C. L. P. A.	Common Law Procedure Act.
L. T. A.	Land Transfer Act.
L. C. A.	Land Charges Act.
J. A.	Judgments Act.
M. W. P. A.	Married Women's Property Act.
P. R.	Personal Representatives.
R. S. C.	Rules of the Supreme Court.
A. C. T.	Analysis of Contracts and Torts.

PART I.

REAL PROPERTY.

CHAPTER I.

Introductory.

Of the Nature of Real Estate.

Property.—The word property is used as denoting (1) the *right* of ownership; (2) the things which are the *objects* of a right of ownership; (3) anything which can be assessed at a money value.

Ownership chiefly imports the rights of exclusive enjoyment and possession. It may be (1) **Absolute** where it (*a*) includes the rights of free enjoyment and disposition, (*b*) is unlimited in point of duration, (*c*) is not derived out of the ownership of another; (2) **Limited** where either (*a*), (*b*) or (*c*) is wanting.

Things are (1) **Corporeal**, *i.e.*, tangible objects; (2) **Incorporeal**, *i.e.*, mere rights, such as a right of way or the right to recover a debt.

Similarly, property considered as an aggregate of rights consists of (1) rights of ownership over tangible objects, clothed with possession; (2) bare rights unaccompanied by possession.

Property in Land and Goods.—By English law goods may be the objects of absolute ownership, but land is merely the object of *tenure*; in land there cannot be absolute ownership except in the Crown, of whom all land is held, either immediately or through some intermediate (*mesne*) lord.

A subject can have but an **estate**[1] in land, which is, however, *property*, since he has the rights of exclusive

[1] Estate (*status*) first denoted a man's personal condition in law, then the nature, and then the extent of his interest in land.

enjoyment and possession of his holding. The greatest estate is an estate in *fee simple*, *i.e.*, an estate inheritable by the blood relations of the holder, to which are attached the rights of free enjoyment and disposition, making it nearly equivalent to absolute ownership.

The distinction between land and goods is due to (1) the fact that in early times land was the principal form of capital, and services, now paid for in money, were then requited by grants of a holding of land. From the tenants in chief who held land by military services to the King, to the peasant who held by field labour on his lord's demesne, the whole social organisation was based on landholding for services; (2) the physical superiority of land, its permanence and indestructibility, so that a person wrongfully ejected can always be restored to the land itself.

The principle of feudal tenure was definitely established in England after the Conquest, when William I., in granting English lands to his followers, or regranting them to their former owners, did so not by way of absolute gift, but subject to the obligations of fidelity and service to the King, in which if the grantees failed, their holdings would be forfeited.

Land being thus the object of tenure, a parcel of land in a person's occupation with its appurtenant rights was known as a *tenement*. Not every occupier, however, was a feudal tenant; the three most important classes of tenancies were (1) **Freeholding**, held of the King or a mesne lord by free—usually military—services; (2) **Villeinage**, where land was held of the freeholder by services chiefly of field labour regulated by custom, and often servile in character; (3) **Leasehold**, *i.e.*, land held under contract with the freeholder for possession for a certain number or *term* of years.

The incidents of these three holdings varied in respect of (A) the protection given to the possession of the tenant; (B) the devolution of the holding upon death.

(A) Only the freeholder was fully protected. He alone could bring an action in the King's Ct. to recover his holding from anyone who had ejected him or was in

possession of it. The villein held merely at the will and on behalf of his lord, and if his customary rights were infringed he could only appeal to his lord's court for redress. The tenant for years was considered merely the bailiff of the freeholder. If ejected, he originally had no remedy unless he held under a covenant with his landlord. In that case he might bring an action of covenant against the landlord if ejected by him or anyone claiming by superior title. Later he was given special actions for damages against any person who dispossessed him, and *sub* Edw. IV. he could also recover possession of his holding.

(B) The estate of the freeholder was usually hereditary, so that it passed to and was recoverable by the heir, and could not originally be devised away from him. In villeinage the descent of the land depended upon custom. The interest of a tenant for a term of years was reckoned among his chattels at his death.

[Chattels, being absolute property, were applied first in payment of debts. If any surplus remained, one third might be disposed of by will if a wife *and* child survived, one half if a wife *or* child, otherwise the whole.

The will was carried out by the executors of the deceased, who at first took only the surplus, the heir paying the debts; but subsequently took the whole and paid the debts. If a man died *intestate*, the administration of his goods was committed to the ecclesiastical courts and performed after 31 *Edw. III. c.* 11 by an administrator chosen from the next friends of the deceased.]

A freeholding being then the only kind of property in land which was fully recognised, the word "tenement" was used to denote a free tenement only, and the word "lands" or "lands and tenements" as denoting freeholds. Further, as anything which may descend to the heir is called a *hereditament*, lands and tenements were known as hereditaments.

Real and Personal Property.—The terms "real" and "personal" were at first applied to actions. Real actions were those in which restitution of the very thing claimed might be enforced by execution issuing *in rem*. Personal

actions were those brought to obtain pecuniary compensation (damages) for the violation of a right. *Sub* Hen. III. it was established that specific restitution could be claimed only in actions for the recovery of immoveables. In civil proceedings for moveables the defendant could absolve himself by payment of their value,[1] and such actions were therefore classed as personal. Actions were thus said to *sound* in the *realty* or in the *personalty* according as the relief was specific recovery or damages. Hence the word *realty* was used to denote things specifically recoverable, *i.e.*, lands and tenements (also called "things real"), while moveable goods, debts, &c. were termed things personal.

Freeholds being, however, originally the only lands specifically recoverable, the word "realty" was used as denoting freehold. Interests in land, which were reckoned as chattels, were known as *chattels real*, while moveable goods were *chattels personal*.

As freeholds passed to the heir but chattels to the executor, the notion of descent to the heir became associated with realty, and only things inheritable as well as specifically recoverable—*i.e.*, *real hereditaments*—were classed as real estate. Chattels real, though specifically recoverable, were considered personal estate as they passed to the executor.

The terms *real* and *personal estate* did not come into general use much before Charles II. By that time the development of modern commerce and capital had begun. Tenure had lost its importance as money payments were adopted, and the freeholder in all but form enjoyed absolute ownership.

Military tenure was finally abolished by 12 *Car. II. c.* 24. Villeinage had become extinct, giving rise to the customary tenure of *copyhold*, and, since the copyholder might maintain an action for the recovery of his holding, and might also have an estate inheritable by his customary heir, copyhold was included in real estate. Leaseholds, however, never ranked as real estate.

[1] Since the C. L. Procedure Act, 1854, it has been possible to enforce the specific restitution of chattels.

It must be noticed that the common law rule of descent to the heir, which was characteristic of real estate, has now been modified by the *Land Transfer Act*, 1897. *Post*, p. 39.

The terms corporeal and incorporeal are particularly applied to hereditaments. Land in the possession of a freeholder is a corporeal hereditament, while mere rights to or over land in another's possession—*e.g.*, a reversion in fee or a right of way—are incorporeal hereditaments.

The former were alienable at C. L. by **feoffment**, *i.e.*, gift of a feudal estate, coupled with **livery of seisin** or formal delivery of possession. The latter, if alienated with land for the benefit of which they were enjoyed, passed by feoffment of the land without express mention; but if alienated alone required for their transfer a sealed writing or *deed* of grant. Hence corporeal hereditaments were said to be in *livery*, but incorporeal in *grant*.

CHAPTER II.

OF FREE TENURE.

Free Tenure.—A freeholder who is possessed of land[1] for an estate in fee simple is said to be *seised thereof in his demesne as of fee.* See *Copestake* v. *Hoper*, 1908, 2 Ch. 10.

The freeholder might be (*a*) a tenant *in capite* holding by a grant immediately from the King; (*b*) a sub-tenant to whom a tenant *in capite* had made a similar grant by *subinfeudation*, becoming thus a mesne lord between the King and the sub-tenant. The mesne lord was no longer seised *in his demesne* of the land which he had so granted but *in service.*

The sub-tenant might in the same way make a further grant, and so on *ad infinitum;* at first, however, the law of feudal tenure was applied only to the estates of the greater landholders.

The feudal lord was mainly bound to warrant his tenant's

[1] The ownership of land carries with it everything both above and below the surface. *Cujus est solum ejus est usque ad cœlum et usque ad inferos.*

title to the land bestowed, and to give him lands of equal value if he was ejected by anyone showing superior title The tenant was bound to fealty and to perform the services stipulated for.

The St. **Quia Emptores** (18 *Edw. I. c.* 1) abolished sub-infeudation and permitted every free tenant in fee simple to sell his whole holding or any part thereof, the purchaser holding not of the vendor but of the vendor's lord and subject to the services upon which the vendor had held. Thenceforth it has been impossible to create tenure upon the grant of a fee, nor could a freeholder in fee any longer make himself a mesne lord.

The Domesday Survey.—At this time large tracts of land in each county belonged to the King or were held by tenants *in capite*. Each tract usually consisted of several *manoria*, which were not all necessarily in the demesne of the tenant *in capite*, but might be held of him by sub-tenants.

A manor was the unit of agricultural tenure and included (i.) Land in the demesne of the lord of the manor, containing his mansion; (ii.) the common fields and the houses of the *villani;* (iii.) the cottages and arable land belonging to the *cotarii* (cottiers); (iv.) the waste lands on which the cattle of the tenants were pastured; (v.) any freeholdings held by sub-tenants.

In some parts of England there also existed another kind of freeholding, that of the *liber sochemannus*, holding part of the lands in the manor by light labour services, and bound also to do *suit of court* (p. 7). In towns and boroughs there was a third species of freeholding, namely, houses held in *burgage* by the *burgenses* (burgesses), generally at a money rent, and subject to the customs of the borough.

Changes between 11th and 13th Centuries.—The *villani* became *personally* unfree. As the law of tenure spread downwards, the number of small freeholdings increased, and a large class of free tenants arose, who held merely parts of a manor at fixed rents, and by occasional and definite agricultural services. Their tenure acquired the name of **socage** after that of the *liberi sochemanni*.

The Classification of Tenures.—Henry II. re-organised and appointed permanent judges of the King's Ct., and by the *assize of novel disseisin* gave a remedy in that Ct. to all freeholders wrongfully dissesised. As a result of the judge-made law thus established, the following classification of tenures was accomplished :—

(A) **Free** tenure, which was either spiritual or lay, the two chief forms of the latter being knight's service and socage; (B) **Villeinage,** which was either pure or privileged.

The chief **incidents of tenure by knight service** were (1) **the obligations of the tenant,** of which the chief were—(i.) to perform military service for his lord. This, after Henry II., was in the case of sub-tenants usually commuted for a money payment (*scutage*). Both scutage and the obligation of military service became obsolete after Richard II.; (ii.) to render pecuniary aids to ransom the lord, to make his eldest son a knight, and to marry his eldest daughter; (iii.) to do homage upon entering his estate and to take the oath of fealty; (iv.) to pay (if he was of full age) a fine (*relief*) on succeeding to his ancestor's estate; (v.) to do *suit of court*, that is, to attend and assist at the business of the court baron, *i.e.*, the lord's court, in which the freeholders of the manor were both suitors and judges. The king's tenants *in capite* were also liable to other exactions.

(2) **The rights of the lord**—the chief being—(i.) to have the *wardship* of infant heirs without accounting for profits, and to dispose of them in marriage to his own greatest advantage; (ii.) to have the lands again as his *escheat* on failure of the tenant's heirs or on his attainder. On attainder the lands were first held by the Crown for a year and a day, except in case of high treason, when they were forfeited absolutely to the Crown.

Grand Serjeanty was almost equivalent to knight service, and was subject to the burdens of wardship and marriage. From the time of Littleton it was a holding by personal services to the King, such as carrying his banner.

Free Socage was originally the tenure of the *liberi sochemanni* (p. 6); afterwards the term was extended to

the tenure of freeholders holding parts of a manor by rent in money and services, which were generally agricultural but fixed, and less onerous than those of villeins, and which were subsequently commuted for money payments. A tenant in socage was bound to take an oath of fealty, and was liable to render the aids *pour fille marier* and *pour faire fils chevalier*. Suit of court and escheat were also incident to socage and a relief of one year's rent on succession. But the right to the **wardship and marriage** of an infant heir did *not* devolve upon the lord but upon the nearest relative to whom the inheritance could not descend, who, by 52 *Hen. III. c.* 17, was accountable to the heir.

The term socage was extended later to include all tenure by certain services other than knight service, and, particularly, petty serjeanty and burgage.

Petty serjeanty was a tenure by some service of small value, as where lands were held by yielding yearly a sword or other small implement of war.

Frankalmoign.—This tenure arose when land was given to an ecclesiastical corporation to be held by them and their successors by Divine services for the soul of the grantor and his heirs. No temporal service was required of them, and, as a corporation never dies, no escheat was possible. Hence land given to any corporation was said to be in *mortmain*.

Free Tenure in Modern Times.—Scutage, military service, homage and fealty rapidly became obsolete, but the rights of wardship and marriage and the exactions to which heirs of tenants *in capite* were subject were enforced until 1645, when they were abolished. And by 12 *Car. II. c.* 24, all estates of inheritance except copyhold and frankalmoign were turned into free and common socage and relieved from all the charges of knight's service.

See *Copestake v. Hoper*, 1908, 2 Ch. 10.

The chief incidents of **modern socage tenure** are (i.) a small *quit-rent*, *i.e.*, a rent by which the tenant is quit of all services; (ii.) a relief of one year's quit-rent payable by the heir; (iii.) suit of court—in case of estates in fee simple held of any manor still existing; (iv.) escheat on failure of heirs from *natural* causes. By the

Forfeiture Act, 1870, all attainder, forfeiture, or escheat upon judgment for treason or felony was abolished. In case of escheat the lands pass to the Crown unless there is a mesne lord who can show that the estate so terminated was originally granted before the *Quia Emptores*, and was held of him and not of the Crown. When the lord of the fee is not the Crown the devolution of the estate is governed by the provisions of the Land Transfer Act, 1897, which does not, however, affect lands escheating to the Crown.

Grand serjeanty still remains, deprived of the burdens of knight's service but retaining its honorary services. Petty serjeanty being practically socage, was unaffected by the 12 *Car. II. c.* 24.

Other existing varieties of socage tenure are—

(1) **Gavelkind**—prevailing chiefly in Kent—in which (i.) if a tenant in fee dies intestate the land descends to all males in equal degree in equal shares;[1] (ii.) a tenant in fee can, at the age of 15, dispose of his estate by feoffment; (iii.) no escheat existed on judgment of death for felony; (iv.) particular rules governed dower and curtesy. *Post*, pp. 54, 59.

(2) **Borough English**, in which the estate devolves to the *youngest* son.

(3) **Ancient demesne**, existing only in manors which were in the demesne of the Crown under Edward the Confessor and William I. Before 1852, all actions and judicial proceedings concerning the title to land of this tenure could take place only in the lord's court. See *Merrtens v. Hill*, 1901, 1 Ch. 842.

CHAPTER III.

OF AN ESTATE IN FEE SIMPLE.

ESTATES in land are either freehold or less than freehold. Freehold estates are either estates of inheritance (fee

[1] *Re Chenoweth*, 1902, 2 Ch. 488. The custom of gavelkind is the common law of the land of Kent, and need not be proved by usage, as is the case of a manorial custom, which is contrary to the common law. "The partibility among heirs of the same degree extends to all degrees of remoteness."

simple, fee tail) or estates for some definite period of *uncertain* duration (life estates, *pur autre vie* estates). Estates less than freehold arise where land is held for a certain term, or at the will of the donor, or on sufferance.

An **estate in fee simple** is an estate given to a man and his heirs, simply and without restriction, inheritable by his blood relations, collateral and lineal, according to the rules of descent. It possesses all the incidents and advantages of absolute ownership except the form. These advantages were, however, gained gradually.

Right of alienation during life.—Originally the feudal system did not permit alienation, as being inconsistent with the rights of (*a*) the heir—a grant of a fee to A. and his heirs being considered to confer a separate and independent interest upon the heirs; (*b*) the lord, who retained rights over the land by virtue of the services due which he could enforce by distress, and who also had the right of an escheat. Consequently a tenant could originally alienate land only by subinfeudation, and even then only with the consent of his own heir and of the lord.

(*a*) **Right to alienate as against the heir.**—*Sub* Hen. II. a freeholder might, in certain cases, grant away *part* of his land; he could not by alienation entirely disinherit an heir of his body, but only collateral heirs. *Sub* Hen. III., however, even a son might be wholly disinherited, and it was held that on a gift of land to A. and his heirs the heir acquired nothing by *purchase*, *i.e.*, took no immediate interest or estate, but acquired merely the expectation or possibility of inheritance.

(*b*) **Right to alienate as against the lord.**—*Sub* Hen. III. it was held that a tenant might, even without consent of his lord, absolve himself from his feudal obligation by disposing of his *whole* tenement to another to hold of his lord. But a part of the tenement could be alienated only by consent of the lord or by subinfeudation, which deprived the lord of the rights of wardship and marriage in respect of infant heirs of the sub-tenants. With regard to escheat, a tenant could not at first alienate so as to bar the claim of the lord to have the land, on failure of his

heirs, unless the grant contained words expressly conferring on the tenant the power of alienation. But *sub* Edw. I. it was held that alienation in fee by a tenant holding to him and his heirs would deprive the lord of his escheat on failure of the tenant's heirs. Finally, by the *Quia Emptores*, the right to alienate all or any part of a holding was established, the new tenant holding as long as his own heirs may last independently of the existence of any heirs of the former tenant. The statute did not, however, apply to tenants *in capite* who did not acquire liberty of alienation until a later date.

Ante, p. 6.

For alienation by will, see *post*, p. 42.

Exceptions to the ordinary right of alienation still exist in the case of (i.) infants and other persons subject to incapacity; (ii.) alienation into mortmain otherwise than by royal licence or by statute; (iii.) alienations for charitable purposes.

Post, Chap. XIII.

By the *Mortmain Act*, 1888, replacing earlier Acts, every assurance of any hereditaments for charitable uses is void unless made in accordance with the provisions of the Act.[1] This Act prohibited the gift *by will* to a charity of any interest in land. But by the amending Act of 1891 land may be assured by will for a charity, but, except in certain specified cases, it must be sold within one year from the testator's death.

All **voluntary conveyances** of land were formerly, as a result of 27 *Eliz. c.* 4, held to be void as against subsequent purchasers for value from the grantor. But by the *Voluntary Conveyances Act*, 1893, no voluntary conveyance made *bona fide* and without fraudulent intent can be defeated by any subsequent purchase for value.

Free enjoyment.—A tenant in fee simple has the right

[1] The assurance must be (i) by deed; (ii) executed before at least two witnesses; (iii) twelve months before death [except in case of sales for full value]; and (iv) enrolled in the Central Office of the Supreme Ct. within six months after execution; and (v) must take effect in possession immediately; and (vi) must, as a rule, be without any provision for the benefit of the assurer or his successors (s. 3). Assurances of personal estate to a charity for the purchase of land are subject to similar restrictions, but if personalty be so directed to be laid out by *will*, the charity may keep the gift and disregard the condition (1888, s. 4; 1891)

of free enjoyment, and may commit any waste or use his lands as he pleases, provided that he does not inflict any injury upon his neighbours by infringing their legal rights to enjoy their lands in the same manner, *e.g.*, by creating a nuisance or by causing damage through the escape from his own land of water, filth or any noxious matter collected or brought upon the land by him;[1] provided also that his rights have not been curtailed by his own or his predecessor's contracts or by statutory regulations.

Restrictions on alienation cannot, as a rule, be annexed to any gift of property, but (i.) the *duration of* a gift may be limited to a time during which it can be personally enjoyed by the grantee. Thus land may be given to or in trust for A. *until* he becomes bankrupt or attempts to dispose of it. But a man cannot settle his *own* property on himself so that on his bankruptcy it shall go over to some other person and not pass to the trustee in bankruptcy.[2] (ii.) Property may be settled on a married woman so that she cannot dispose of it during marriage. (iii.) The policy of the law prohibits the alienation of certain property, *e.g.*, pensions and salaries given by the State for the performance of present or future duties.

Post, p. 56.

Chap. XII.

The Heir.—Subject to the debts of the deceased and to the rights of his or her wife or husband, and subject also to the L. T. A. 1897, the lands of a tenant in fee simple if undisposed of by his will descend to his heir. The heir is appointed by law. All other persons whom an individual may appoint as his successors, *e.g.*, a devisee under his will, are *assigns*. The heir comes into existence only upon the decease of the ancestor; during his lifetime a man can only have either (i.) an *heir apparent*, that is, a person who, if he survives, must be the heir, *e.g.*, his eldest son, or (ii.) an *heir presumptive*, *i.e.*, a person who would be heir if the ancestor died at once, *e.g.*, his eldest daughter.

Chap. XIII.

Post, p. 39.

[1] *Chasemore* v. *Richards*, 7 H. L. C. 349; *Bradford Corporation* v. *Pickles*, 1895, A. C. 587; *Rylands* v. *Fletcher*, L. R. 3 H. L. 330; *West* v. *Bristol Tramways Co.*, 1908, 2 K. B. 14.

[2] See *Mackintosh* v. *Pogose*, 1895, 1 Ch. at p. 511. This rule applies only to a limitation upon bankruptcy (*Detmold* v. *Detmold*, 40 C. D. 585).

Sub Hen. II. estates of inheritance held by military tenure descended first to the eldest son, while those of free sokemen were either shared among the sons or passed to the youngest or eldest according to the custom. In default of sons, they passed in either case to daughters in equal shares. Next came descendants of children, and in default of them the collateral relations. In the later socage tenure the land followed the rules of descent applicable to military tenure, and descent to the eldest of several males in the same degree was the rule for all freehold land except gavelkind.

By Bracton's time it was established that all descendants *in infinitum* of any person who would have been heir should inherit in his place by representation. A lineal ancestor, however, could never be heir to his descendant, and kindred of the half blood were altogether excluded.

These rules remained unaltered until the Inheritance Act, 1833. *Post*, p. 40.

CHAPTER IV.

OF AN ESTATE TAIL.

AN **estate tail** is an estate which, if left to itself, will descend on the death of the first owner to all his lawful issue *in infinitum*, but determines on cessation of issue. It may be either **general**, *i.e.*, to the heirs of his body generally, or **special**, *e.g.*, restrained to heirs of his body by a particular wife. It may also be *in tail male* or *in tail female*, descending only to males or females.

History.—To prevent collateral relations succeeding to a tenant in fee who left no issue, it was necessary to limit the estate to him and *the heirs of his body*, making a *conditional gift*, the condition implied being that if the donee died without such heirs, or if such heirs failed at any future time, the land should revert to the donor. By the time of Edward I. it was held that the mere birth of issue was a performance of the condition so as to enable the donee

to alienate in fee and prevent the land from reverting to the donor if his issue came to an end.

To remedy this, it was provided by the *De Donis Conditionalibus* (13 *Edw. I.*, *c.* 1) that in case of such a gift the will of the donor shall be observed, and that the donee should have no power of alienation so as to prevent the land from descending to his issue or reverting to the donor on failure of issue.

Since this statute an estate given to a man and the heirs of his body has been termed an **estate tail.** The inconvenience of strict entail soon became manifest, and means were found of evading the statute. It was held that if a tenant in tail disposed of the land, but left assets of equal value to his issue, the issue were bound to abide by his alienation. Further, it was held that the issue would be barred if a mere judgment had been obtained entitling them to recover lands of equal value from some other person. And this held good even though the judgment had been obtained by collusion with the tenant in tail.

Recoveries and Fines.—An estate tail might accordingly be barred by judicial proceedings as follows:—

If A. warranted the title of lands given by him to B., he might be called upon to defend any action brought to recover the lands from B. or to surrender to B. lands of equal value. The tenant in tail therefore, on a collusive action being brought against him, *vouched to warranty* X., some man of straw, *i.e.*, called on him to defend the action as having been the original donor of the estate tail; X. allowed judgment to go by default. The plaintiff (demandant) got judgment to recover the land from the tenant in tail, who in his turn got judgment to recover land of equal value from X. The effect of this mere judgment for recovery against X. was to bar not only the issue but also the reversion of the donor and any remainders after the estate tail, and the plaintiff became possessed of an estate in fee simple, which he disposed of according to the wishes of the tenant in tail.

Later the proceedings were varied as follows:—The lands were conveyed by a deed called the recovery deed

to another person, D, against whom the action was brought and who was called tenant to the *præcipe*, or writ. D, being sued, vouched to warranty the tenant in tail, who in his turn vouched to warranty the crier of the court, who was termed the common vouchee. The common vouchee then allowed judgment to go by default and a writ was directed to the sheriff to put the demandant in possession.

The claim of the *issue*, though not the remainders and reversion, might also be barred by a **fine**. This was a compromise made by leave of the Ct. in a genuine or fictitious action, whereby the lands were acknowledged to belong to one of the parties. It was enrolled among the records of the Ct. and put an end to all claims not made within a year and a day.

Originally the *De Donis* prevented an estate tail from being barred in this way, but by Statutes of Hen. VII. and Hen. VIII. a fine by a tenant in tail had the effect of barring his issue.

Both fines and recoveries were abolished by the **Fines and Recoveries Act, 1833,** which substituted for them a simple deed executed by the tenant in tail and enrolled formerly in the Ct. of Chancery and now in the Central Office of the Supreme Ct.

No plan can now be adopted whereby lands can be tied up for a longer period than the lives of existing persons and 21 years from their decease. Where estates are kept up from one generation to another, this is done only by re-settlement. Thus, on a marriage settlement, land is settled on the husband for life, and on his death to the first and other sons successively in tail male. The estate is thus tied up until some tenant in tail attains twenty-one. He then, with his father, who is life tenant in possession, bars the entail, and the land is re-settled on the father for life, with remainder to the son for life, and remainders to the son's eldest and other sons in tail.

Where an estate tail is not in possession, the right to bar it is subject to limitations. A recovery could be suffered only by a tenant in tail in possession or a tenant

in tail in remainder with the consent of the first tenant for life. On the same principle a tenant in tail not in possession can at present bar the reversion and remainders only with the consent of the *protector of the settlement*, who is usually the first life tenant in possession created by the same instrument as that creating the estate tail. If the protector refuses his consent, the tenant in tail can bar his own issue, but he cannot bar the reversion and remainders. The estate thus created is a **base fee,** the tenant in tail acquiring a disposable interest merely so long as he has any issue or descendants living. A base fee may, however, be *enlarged* into a fee simple absolute (*i.e.*, the remainders and reversion may be barred) by deed executed by the person who would have been tenant in tail if the estate tail had not been converted into a base fee, and enrolled within six months after its execution; but the consent of the protector is necessary until the protectorship of the settlement has come to an end. It will also be enlarged into a fee simple absolute if the owner of the base fee continues in possession for 12 years after the protectorship of the settlement has come to an end.

Fines and Recoveries Act, 1833, s. 22.

Ss. 19, 35. See *Bankes* v. *Small*, 36 Ch. D. 716.

37 & 38 Vict. c. 57, s. 6.

The following estates tail **cannot be barred**:—

(1) An estate tail granted by the Crown for public services, and of which the reversion continues in the Crown.

(2) An estate in *special* tail held by a person who is *tenant in tail after possibility of issue extinct, e.g.*, if an estate is given to a man and the heirs of his body by his wife B, it cannot be barred after the death of B.

(3) An estate held by a woman as tenant in tail *ex provisione viri*.

Note that an *estate tail cannot be barred by will or by contract*, but only by a deed enrolled under the Act of 1833.

Powers of a Tenant in Tail.—A tenant in tail may make any disposition of the lands to hold good during his own life. And by statute he may make dispositions binding his issue and the reversioners or remaindermen. Thus by the Act of 1833 a tenant in tail in possession may,

without a deed enrolled, make leases for not more than twenty-one years and at not less than five-sixths of a rack rent.

And the following have all the powers of a life tenant under the **S. L. A., 1882**:—(i.) A tenant in tail, except a tenant in tail of land purchased with money provided by Parliament in consideration of public services, who is restrained by Act of Parliament from barring the entail; (ii.) a person entitled to a base fee; (iii.) a tenant in tail after possibility of issue extinct. *Post*, p. 19. S. 58.

A tenant in tail has the same rights of enjoyment as a tenant in fee simple and may commit any waste.

Tenure of Estate Tail.—If a tenant in fee simple grants his lands for an estate tail, *tenure* is still created between him and his grantee, as the *Quia Emptores* prohibits subinfeudation only in case of grants in fee simple; and on creation of such an estate any rent or services might be reserved.

CHAPTER V.

OF AN ESTATE FOR LIFE.

A **life estate** is a freehold not of inheritance, the tenant's interest ceasing at his death and not passing to his representatives. To create such an estate it is usual to expressly limit the lands to the grantee during his life. But a grant of land by deed "to A." simply without further words expressly conferring on him an estate transmissible to his heirs gives him only a life estate. In wills, however, made after 1837, by the *W. A.*, 1837, a devise of real estate without words of limitation passes the fee simple or the whole estate or interest of which the testator had power to dispose unless a contrary intent appears by the will. S. 28.

If a tenant in fee simple grants lands to another for life, tenure is created, as on the gift of an estate tail, and rent or services may be reserved. In early times life estates often arose under leases at money rents, but now they arise chiefly under settlements, and no rent is reserved.

A life estate may be **determined** not only by natural but by civil death, *e.g.*, outlawry in criminal proceedings.

Powers of enjoyment.—A life tenant, unless restrained by agreement, has the right to cut wood for fuel, for instruments of husbandry, and for repairs, and also to cut underwood and lop pollards. But he may **not** commit any voluntary waste. Thus he may not cut timber or open new mines, but he may continue to work mines already open, and may also cut timber on a timber estate previously cultivated with a view to periodical croppings. Formerly the committing of waste entailed forfeiture enforced by a writ of waste. Now a life tenant is liable only to pay damages for any waste committed, but may be restrained by injunction from committing further waste. Under the **S. L. A. 1882,** a life tenant impeachable for waste in respect of timber may cut and sell any ripe timber with the *consent* of the trustees of the settlement or of the Ct., and may keep one-fourth of the proceeds, the rest being set aside as capital.

See *Dashwood v. Magniac*, 1891, 3 Ch. 306;

Re Trevor-Battye's Settlement, 1912, 2 Ch. 339.

S. 35.

If the estate is given to the life tenant by a written instrument expressly declaring his estate to be without impeachment of waste, he may cut timber and open mines, and commit other waste for his own benefit. But even in this case he may not without express power commit **equitable waste,** *i.e.*, pull down the mansion house or cut ornamental timber.

A life tenant is not liable for **permissive waste,** *i.e.*, mere non-repair, unless the duty of repair is expressly laid on him by his grantor.

A life tenant could not at C. L. make any disposition to last beyond his own life, and he can still do no more for his own exclusive benefit. But he has large *powers* of disposition for the benefit of those entitled after his death as well as himself. Such powers are means of conveying lands independently of the right of alienation incident to the estate in the land, *i.e.*, powers given to a life tenant of creating leases to hold good after his death. They could originally arise, in the case of settled land, only by the express provision of the parties creating the settle-

ment; but now, **under the Settled Land Acts, 1882-90,**[1] every life tenant in possession under a settlement has wide powers of selling, leasing, &c., exercisable for the benefit of all parties entitled under the settlement, but not for his own benefit to the prejudice of his successors. The chief of these powers are— As to who is a life tenant, see S. L. A. 1882, ss. 2, 58; 1884, s. 8.

(1) To create building *leases* for not more than ninety-nine years, mining leases sixty years, other leases twenty-one years in England, thirty-five years in Ireland. But the mansion house and grounds may not be leased without *consent* of the trustees or order of the Ct., except where it is occupied as a farmhouse, or where the site of the house and grounds does not exceed twenty-five acres. All leases must be by deed (except those for not more than three years), must take effect in possession within twelve months from their date, must be at the best rent possible, and contain a covenant for payment of rent and a condition for re-entry on non-payment after thirty days at most. Building leases, which may contain an option of purchase, must be partly in consideration of the lessee or some other person having erected, improved, or repaired some building or executed some authorized improvement in connection with building purposes or agreeing to do any of these things. In mining leases three-fourths of the rent must go as capital if the life tenant is impeachable for waste in respect of minerals; otherwise one-fourth. Before making a lease (except those for not more than twenty-one years) he must give not less than one month's *notice* to each of the trustees and their solicitor. Such notice may, however, be notice of a *general* intention. S. L. A. 1882, ss. 6—10; 1889, s. 2; 1890, ss. 7—9. S. L. A. 1890, s. 10. S. L. A. 1882, s. 7; 1890, s. 7. S. L. A. 1882, s. 8; 1889, s. 2. S. L. A. 1882, s. 11. As to the rent, see S. L. A. 1890, s. 8. S. L. A. 1882, s. 45; 1884, s. 5; 1890, s. 7. S. L. A. 1884, s. 5.

(2) To *sell or exchange* or concur in making *partition* of any part of the settled land, subject to similar restrictions in the case of sale or exchange of the mansion house and subject to giving *notice* as above. All money received S. L. A. 1882, ss. 3, 4. S. L. A. 1882, s. 22.

[1] The Settled Estates Act, 1877, had already created certain powers of leasing and sale which are, however, for the most part superseded by those created under the Settled Land Acts. See, however, s. 41 of the Conveyancing Act, 1881.

on sale or exchange must be paid to the trustees or into Ct., and is to be invested by the trustees according to the directions of the life tenant or of the Ct., in any of the investments authorized by the Act. These include certain securities, discharge of incumbrances upon the settled land, payment for *authorized* improvements and purchase of other lands. All capital money arising under the Act is made subject to the settlement as if it were land, and the income of invested capital is paid to the persons entitled to the income of the land.

S. L. A. 1882, s. 21; 1890, s. 11.

S. L. A. 1882, s. 22.

(3) To *mortgage* the settled property in order to raise money for enfranchisement, equality of exchange or partition, or discharging incumbrances.

S. L. A. 1882, s. 18.

S. L. A. 1890, s. 11.

For carrying into effect his powers he may by deed convey the settled land for all the estate which is the subject of the settlement or any smaller estate. He cannot assign, release, or contract not to exercise his powers, which remain in him, although he assigns his estate, but cannot in such a case—except where the assignment is in consideration of marriage or by way of family arrangement[1]—be exercised so as to affect the rights of an assignee for value without his consent.[2] Any proviso in the settlement forbidding him to exercise them is void.

S. L. A. 1882, s. 20.

S. L. A. 1882, s. 50.

S. L. A. 1890, s. 4.

S. L. A. 1882, s. 51.

Improvements of various kinds are authorized by s. 25 of the S. L. A. 1882 and s. 13 of the S. L. A. 1890. Before making any of these authorized improvements the life tenant must submit to the trustees or the Ct. a scheme showing the proposed expenditure, and a certificate of the Board of Trade or of an engineer or surveyor approved by the trustees or by the Board, or an order of the Ct., is required before any capital arising under the Act is applied in payment for improvements. But the Ct. *may* make an order though a scheme has not been submitted before execution of the improvements. If the capital is

S. L. A. 1882, s. 26.

S. L. A., 1890, s. 15.

[1] In such a case the instrument of assignment and the original settlement create a *compound* settlement. See *Re Mundy and Roper*, 1899, 1 Ch. 275.

[2] See *Re Mundy* and *Roper*, 1899, 1 Ch. 275.

in Ct. the scheme must be submitted to and approved by the Ct.

If there is no capital available, money may for certain purposes be borrowed under the **Improvement of Land Act, 1864,** and charged upon the inheritance of the land as a rent charge. The Act of 1864 is now extended so as to include all improvements authorized by the Settled Land Acts. And, by the S. L. A. 1887, capital arising under the Act of 1882 may be applied in paying off such charges. S. 1

Determinable life estates arise where land is given to a widow during her widowhood, or to a man until he become bankrupt, or for any similar definite period of time of *uncertain* duration.

If a life tenant die before harvest, his personal representatives will be entitled to the **emblements** (*i.e.*, to reap the crop sown) unless the estate is determined through the tenant's own act. An under-tenant, however, in all cases is entitled to the emblements. Under-tenants holding at a rack rent now by the Emblements Act, 1851, instead of claiming emblements continue to hold on to the expiration of the current year of the tenancy, paying a proportionate part of the rent to the succeeding owner. S. 1.

Apportionment of rent.—At C. L. rent was not apportionable. If a life tenant let land reserving rent quarterly and died between two quarter days, no rent was due from the under-tenant to anyone from the last rent day to the death. Also, if a life tenant had a *power* of leasing, his executors had no right to any part of the rent in case of his death between two quarter days, but the whole quarter's rent went to the person next entitled. Now, by the **Apportionment Act, 1870,** all rents and other periodical payments in the nature of income are considered as accruing from day to day and apportionable accordingly.

Pur autre vie estates.—If a life tenant assigns his estate, the assignee is entitled to an estate for the life of the assignor, who is called the *cestui que vie*. Such an estate is called a *pur autre vie estate*, and is freehold. In this case, as well as in that of an original grant to a person for the life of another, the tenant *p. a. v.* was formerly

entitled to enjoy the property only so long as he himself lived, unless it was granted to him and his heirs. Otherwise at his death anyone could enter as *general occupant* and enjoy the property during the life of the *c. q. v.* If it was granted to him and his heirs during the life of the *c. q. v.*, the heir entered as *special occupant*. By the **Wills Act, 1837,** replacing earlier statutes to the same effect, a tenant *p. a. v.* may dispose of his interest by will. If he so disposes of it, or if he dies intestate and there is no special occupant, it devolves upon his executors or administrators, and is subject to his debts and dealt with as personalty. Under the **L. T. A., 1897,** on the death of a tenant *p. a. v.*, his estate devolves in the first instance on his executors or administrators, whether devised or not, and whether or not there is a special occupant. But the beneficial title of a devisee or special occupant is not disturbed.

Ss. 3, 6.

Post, p. 40.

By 6 *Anne*, *c.* 18, any reversioner or remainderman may, on affidavit that he has reason to believe that the death of the *c. q. v.* is concealed, obtain from the Lord Chancellor an order for his production.

If a *p. a. v.* estate is given to a man and the heirs of his body, a **quasi entail** is created, which may be barred by ordinary deed without enrolment.

A tenant for years determinable on life or for the life of another, and not holding merely under a lease at a rent, has all the powers of a life tenant under the **S. L. A., 1882.**

S. L. A., 1882, s. 58.

CHAPTER VI.

JOINT TENANTS AND TENANTS IN COMMON.

A GIFT to two or more in **joint tenancy** makes them, as regards all *other* persons, one single owner, but as between themselves they have separate and equal rights. A joint tenancy is therefore distinguished by unity of *possession*, *interest*, *title* and *time* of the commencement of title.

Any estate may be held in joint tenancy. Thus, if land be given to A. and B. without further words, they

are joint tenants for life, and after the decease of one the survivor is entitled to the whole during the residue of his life.

If land is given to A. and B. and the heirs of their two bodies, then (i.) if A. and B. can marry they have an estate in special tail; (ii.) if A. and B. cannot marry, on the death of either the survivor takes the whole as long as he lives, but on his death it is divided between the heirs of the body of A. and of B. as tenants in common.

If *an estate in fee simple* is given to two or more as joint tenants, *e.g.*, to A., B., C. and their heirs, the survivor of the three is ultimately entitled to the whole, and on his death intestate it goes to *his* heirs only. Nor can one joint tenant devise his share so as to prevent the others taking by *survivorship*. The survivor may, however, devise the land as he likes, unless he is a trustee thereof. *Post*, p. 41.

The L. T. A., 1897, does not affect the right of the survivor to succeed to the whole estate.

The estates of all joint tenants must arise at the same ..., except under conveyances taking effect by the St. ...es and under wills.

...e proper form of conveyance between joint tenants is a **release**, each one already having the seisin of the whole. If one joint tenant alienates his share *during his life*, the joint tenancy is *severed*, and the assignee holds as tenant in common with the other or others of the original joint tenants.

Tenants in common have unity of possession, but distinct and several titles: their shares need not be equal, nor need their interests be the same, and there is no right of survivorship.

Partition.—Both joint tenants and tenants in common can now compel partition. Formerly this was effected by a writ of partition granted under statutes of Hen. VIII., before which it could be effected only by mutual consent.

In 1833 the writ of partition was abolished, and it is now effected by a *partition action* in the Ch. D. The partition must be carried out by mutual conveyances, which in the case of joint tenants are in the form of a

release; in the case of tenants in common a *grant.* By the **R. P. A. 1845, s. 3,** a partition is void unless made by deed.

Ss. 3, 20. By the **S. L. A. 1882,** a life tenant under a settlement of an undivided share has power to concur in making partition of the whole.

Partition may also be effected by order of the Board of Agriculture without any further conveyance.

By the **Partition Act, 1868,** the Court [Chancery Division]—

1. *May* direct a sale instead of partition whenever it appears to be more beneficial to the parties interested **(s. 3).**
2. *Shall,* unless there is good reason to the contrary, direct a sale if so requested by parties interested in at least a moiety **(s. 4).**
3. *May,* if it thinks fit, direct a sale on the application of any party interested, unless the other parties or some of them undertake to purchase his share **(s. 5).**

CHAPTER VII.

THE CONVEYANCE OF A FREEHOLDING AT COMMON LAW.

At Common Law a freeholding was transferred by *feoffment* with *livery of seisin.* Feoffment properly is a gift of a *fee,* but came to be applied to the gift of any freehold. The feoffment need not have been put in writing, but formal livery of seisin was always necessary. This was either livery in *deed* or livery in *law.* **Livery in deed** was performed on the land itself, and was the actual delivery of possession by the feoffor to the feoffee. To make it effective, all persons having any estate or interest in the land must either join in making the livery or be absent from the premises. **Livery in law** was made in sight of the land, and no legal estate passed to the feoffee unless he made entry during the life of the feoffor.

Besides mere livery of seisin, it was necessary that apt words should be used to limit or mark out the estate of the feoffee, *e.g.*, the gift must be to him and his heirs, or him and the heirs of his body, according as he was to take an estate in fee simple or fee tail. If the land was given to him simply without further words or without using the proper technical words, *e.g.*, to him and his *assigns* for ever, he took merely a life estate.

Tortious Feoffment.—If A. made a feoffment to B. of a greater interest than he himself possessed, such feoffment operated *by wrong*. It conferred on the feoffee the whole estate limited by the feoffment and enabled him to maintain the seisin delivered to him against all except those whose title was displaced by the feoffment. And even they might in some cases be deprived of all right to enter on the land, and might be left with merely a right to bring an action for its recovery.

By the **R. P. A. 1845,** a feoffment no longer can have any tortious operation. S. 4.

Writing was not necessary for the validity of a feoffment; a charter declaring the grant was, however, often drawn up and sealed by the feoffor, and such a charter, even though unsealed, was proof of the grant. But soon after the Norman Conquest it was settled that a charter, to amount to conclusive proof, must be sealed by the grantor. Henceforward, only sealed documents were conclusive evidence, and, in fact, nothing was called a writing except a document under seal. Hence a deed is even now necessary wherever the Common Law requires writing. The superior importance of deeds still remains, and they can be enforced, although gratuitous, because of their formal nature. But agreements not made by deed, although made in writing, cannot be enforced unless the promisor received some valuable consideration in return for his promise.

In modern practice the mere placing of the finger on a seal already made is equivalent to sealing, and the words "I deliver this as my act and deed" are equivalent to delivery, even if the party keep the deed himself. An *escrow* is a deed delivered to some person not a party to

See *Xenos* v. *Wickham*, L. R. 2 H. L. 296.

it[1] to be delivered up to the other party on performance of some condition. It is not complete until delivered up on performance of the condition, but then takes effect from the date of its execution. Alterations, &c., in a deed are presumed to have been made before execution; any *material*[2] alteration after execution, either by a party or a stranger, makes a deed void as from the time when the alteration was made, but it does not avoid the deed *ab initio* or destroy any conveyancing effect which it has already had. If there is only one party to a deed, it is called a *deed-poll;* if more than one, an *indenture.*

Until Charles II. writing remained optional in every case in which a deed was not necessary. But by the
S. 1. **St. Frauds** (29 *Car. II. c.* 3) it was provided that any estate or interest in lands made by livery of seisin only, and not put into writing, and signed by the parties or their agents authorized in writing, should have the effect
S. 2. of an estate at will only. From this were excepted leases not exceeding three years from the making, *and* on which a rent of at least two thirds of the full value is reserved.
S. 3. Now by the **R. P. A. 1845,** a feoffment other than one made under a custom by an infant, which is however subject to the St. Frauds, is void unless evidenced by deed.

Besides a feoffment, lands could at C. L. be conveyed without livery of seisin by fines and recoveries, lease and release, confirmation, exchange, or surrender. None of these methods were, however, effective without actual entry.

Post, Chap. IX.

[1] A deed may, however, be delivered as an *escrow* even to a grantee thereunder provided that it is not delivered to him *as grantee,* but as acting in some other capacity, *e.g.*, as solicitor to the grantor and other grantees (*London Freehold Co.* v. *Suffield,* 1897, 2 Ch. 608).

[2] *I.e.*, any alteration which varies the legal effect of the deed or prejudices the party to be bound thereby.

CHAPTER VIII.

OF AN EQUITABLE ESTATE IN LAND.

1. Of Equity and the Court of Chancery.

Equity and the Court of Chancery.—Equity, as opposed to *law*, denotes the body of rules developed in the exercise of the equitable jurisdiction of the Ct. of Chancery. This, like the jurisdiction of the C. L. Cts., was derived from the authority of the King, and arose from the practice of *petitioning* the King in Council for relief in cases where no relief could be had at C. L. from the judges to whom the ordinary jurisdiction had been delegated. About 22 *Edw. III.*, all petitions in these "matters of grace" were ordered to be prosecuted before the Chancellor, whose jurisdiction was further extended by 17 *Rich. II.* c. 6. By the time of Edward IV. the Chancery process was definitely established. It was a process *in personam*, directed against the person complained of, who was summoned to appear and was compelled to carry out the orders of the Ct., or on failure was attached and imprisoned for his "contempt" of the Ct.'s order. But its rules were enforced only in the Chancery Cts.; they created no rights cognizable by the C. L.

Relief was granted, first, where persons who had suffered wrongs at C. L. were hindered by oppression from pursuing their legal remedy. The value of Chancery procedure was that the defendant was interrogated and compelled to make *discovery* of facts which might otherwise have remained undetected, and also that he might be compelled to do some particular act, and not merely to pay damages. Thus, the Chancery jurisdiction was extended to cases where there was a right to relief, but no adequate remedy at C. L.; finally it was exercised in cases in which there was no cause of action at all at C. L.

As the Chancery was a Ct. of *conscience*, not dealing with legal *rights*, but granting *relief* in particular cases, it

was at first governed by few definite principles, and regulated only by the discretion of the Chancellors. Gradually, however, its relief came to be administered on fixed principles derived from its own previous decisions. Modern equity dates from the Restoration, and was evolved largely from the judgments given from the Chancellorship of Lord Nottingham [1] to that of Lord Eldon.[2] By that time it had become a body of case law depending on precedent and admitting no further accessions from the moral domain.

By the Judicature Acts of 1873—1875, the jurisdiction of the old Ct. of Chancery was transferred to the High Ct. of Justice, then established. Equitable rights are now recognized in every branch of the High Ct., and the rules of equity prevail where they are in conflict with those of the Common Law.

Law and Equity are now administered in the same Ct., and an injunction of a Ct. of Equity against proceedings at law is no longer possible. But the two systems of law and equity have not been abolished, and the distinction between legal and equitable rights and remedies still exists.[3] For purposes of procedure, however, the administration of certain matters is assigned to the Ch. D.

Of Uses and Trusts.

Equitable Estates in Land arose from the practice of men transferring their lands to others in trust, to be disposed of according to the directions given by the donor. This might be done either for fraudulent purposes—*e.g.*, to defeat creditors—or for purposes which could not be carried out by ordinary legal methods—*e.g.*, a gift to a friend on trust that he should deal with it according to the directions given by the last will of the donor, the intent being in this case that the donor should have the use of the land during his life.

By Rich. II., it became a common practice for men

[1] A. D. 1673—1682.

A. D. 1801—1806 and 1807—1827.

Salt v. *Cooper*, 16 C. D. 544; *Scott* v. *Alvarez*, 1895, 2 Ch. 603.

to enfeoff several others jointly, or others jointly with themselves, to the intent that the feoffees should dispose of the land according to the will of the feoffor, and hold it for his use. This was often done to escape the burdens of feudal tenure.[1] At first the feoffees plighted their faith to carry out the wishes of the feoffor, as a suit for breach of faith could then be brought in the Ecclesiastical Cts. From Hen. II., however, such suits were in general prohibited, and, *sub* Rich. II., relief against breach of trust was sought from the Chancellor.

Under Edw. IV., the nature of a *use* was settled. A *cestui que use*—*i.e.*, a person to whose use land was held—had no right in law to the land, but only the right to sue the feoffee in trust personally in Chancery. He could also sue the heirs of the feoffee, or anyone who took the land from the feoffee with notice of the trust, but not an assignee for valuable consideration without notice. In case of such an assignment he might, however, recover damages from the feoffee for his breach of trust.

The feoffee was bound in Equity to allow the *cestui que use* to have the profits of the land, to maintain actions for its protection and recovery, and to *execute the estate*—*i.e.*, to dispose of the land according to the directions of the *cestui que use*.

A use might arise by *implication*—thus, if a feoffment was made without declaring any particular intent, and without any consideration, there was an *implied* use in favour of the feoffor. So, also, on a bargain for the sale of land, the seller, after receipt of the purchase money, was considered to hold the land to the use of the buyer. A use was *alienable* without formality by a mere declaration by the *cestui que use* of his wishes concerning the land; hence he could make a testamentary disposition of it.

At *law* the *cestui que use* was considered to have no *estate* in the land. In *equity*, he was considered to have the same estate as he would have had in law if the estate had been executed. Hence there might be in the same land

[1] The right of survivorship of the joint tenants preventing the accrual of the lord's right to relief, wardship and marriage, &c. (p. 7).

two estates—the legal estate of the feoffee to uses and the equitable estate of the *cestui que use.*

The Statute of Uses.—By 27 *Hen. VIII. c.* 10, it was enacted that if one person (A.) stand seised of any lands or other hereditaments to the use, trust, or confidence of *another* person (B.), in such a case B. should be deemed in possession of the land for the same estate as he had in the use. The Statute *executed the use* and gave B. the same estate and possession at law as if the land had been in fact conveyed to him. Thus, if land be conveyed to A. in fee simple to the use of B. and his heirs, the Statute at once gives B. a fee simple in possession. The same applies to implied uses. If A. being seised in fee simple made a feoffment to B. and his heirs without any consideration, and without declaring any use, a use in A.'s favour is implied, which by the Statute is turned into the legal estate, and all that A. gave *results* back to him.

Trusts after the Statute of Uses.—The Statute did not apply to *special* trusts, *i.e.*, where B., the feoffee, had any active duty laid on him, as to sell land; nor did it apply, except where the feoffee to uses was *seised* of a *freehold* interest.

But in case of freeholds the Chancery jurisdiction was for a time ousted by the turning of the use into a legal estate. After about a century, however, the doctrine was established in the C. L. Cts. that there could be *no use upon a use, e.g.*, if land was conveyed unto and to the use of A. and his heirs to the use of B. and his heirs, the second use had no effect at law as being repugnant to the first, and the legal estate remained annexed to the first use.

Equity, however, dealt with the legal owner in the same way, whether he became legal owner at C. L. or under the Statute, and in such a case considered that A. held in trust for B. Thus equitable estates were re-established.

An **equitable estate** is therefore the interest of one in trust for whom another holds lands as legal owner. The holder is the *trustee*, the person beneficially entitled is the *cestui que trust*, and the nature of the trust estate is the same as that of a use before the Statute.

In *special* trusts it is the duty of the trustee to perform exactly the wishes of the person creating the trust.

In *simple* trusts, where there are no active duties, the trustee is bound to maintain actions for the defence of the land, to allow the *c. q. t.* to have possession and take the profits, and if the trust is for him in fee simple, to convey the legal estate to him at his desire.

Strictly speaking, a trust estate is still but a right enforceable against the trustee personally and all who take from him, except *bonâ fide* purchasers for value without notice. In equity, however, the *c. q. t.* is the owner of the land against all persons bound by the trust, and he may have equitable estates therein analogous to legal estates, *e.g.*, an equitable estate in fee tail or for life.

See *Pilcher* v. *Rawlins*, L. R. 7 Ch. 259.

Trusts are (*a*) **express**—created by act of parties—(i.) by the conveyance of lands to A. in trust for B.; (ii.) by A. declaring he holds his own lands in trust for B. But a mere voluntary *promise* to transfer property without a declaration of trust is not enforceable in equity.

Richards v. *Delbridge*, L. R. 18 Eq. 11.

(*b*) **Implied**—created by operation of law—*e.g.*, (i.) where A. conveys property on trusts which fail; (ii.) where A. on purchasing property takes a conveyance in the name of B., and there is nothing to show he intended B. to benefit; (iii.) where A., being trustee for B., uses his position to obtain some benefit for himself; (iv.) where A. has contracted to sell land to B.[1] In cases (i,) and (ii.) there is a **resulting** trust in favour of A.; in (iii.) and (iv.) A. is a **constructive** trustee for B.[2]

In making declarations of trust, if the intent is clear it is not necessary to use for the creation of *equitable* estates the same technical expressions as are required to limit estates at law.[3] But if technical legal terms are

[1] "The moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold" (*Lysaght* v. *Edwards*, 2 Ch. D. at p. 506).

[2] See also, for other examples of constructive trustees, *Soar* v. *Ashwell*, 1893, 2 Q. B. 390.

[3] See *Re Tringham's Trusts*, 1904, 2 Ch. 487, and compare *Re Irwin*, p. 752.

employed, they are construed in their strict legal sense except in **executory** trusts, *i.e.*, trusts in which there is merely an expression of general intent which must be carried out by some further instrument. In such cases words will not be given their strict legal meanings if to do so would defeat the intent of the person creating the trust. Thus in marriage *articles*, where an intent to provide for the children of the marriage is inferred, words which would ordinarily confer an estate tail upon the donee may be construed as giving him merely an estate for life followed by separate estates in his children. Otherwise the donee might defeat the intent of the settlor by barring the estate tail.

ckville-West v. *Holmesdale*, L. R. 4 H. L. 543.

A similar regard to intention is shown in case of implied trusts. Thus immediately a contract for the purchase of freehold is complete, the purchaser gets at once a corresponding equitable estate which devolves on his heir as realty if he dies intestate before conveyance.

So also an agreement for a lease for years gives the lessee an estate in equity during the term. Similarly if land be directed to be sold and the proceeds to be invested in other land to be settled on certain persons, such persons are in equity deemed to be in possession of the estates which they are intended to have. In all these cases the principle is, that Equity considers as done that which ought to be done.

Walsh v. *Lon. dale*, 21 Ch. D. 9.

Re Cleveland's Settled Estates, 1893, 3 Ch. 244; *Re Gosselin*, 1906, 1 Ch. 120.

An equitable tenant in fee or in tail has the same **right of enjoyment** as a legal tenant, but an equitable life tenant is in respect of *waste* in the same position as a legal life tenant.

A *legal* tenant in fee simple may in equity be subject to restrictions on the use of his land imposed by his own agreement or that of his predecessors for the benefit of some other land, and such restrictions may be enforced by injunction against him, his heirs and assigns, except assigns for value, without notice of the restriction.[1]

[1] See *Tulk* v. *Moxhay*, 2 Ph. 774; *London and South Western Ry.* v. *Gomm*, 20 Ch. D. 562; *Rogers* v. *Hosegood*, 1900, 2 Ch. 388; *Formby* v. *Barker*, 1903 2 Ch. 539; *Elliston* v. *Reacher*, 1908, 2 Ch. 376, 665.

An equitable owner has a free **power of disposition** *inter vivos* or by will, commensurate with his estate. Thus an equitable estate tail must be barred in the same way as an estate tail at law, and a *c. q. t.* of lands for life cannot for his own benefit dispose of more than his own interest. But a person beneficially entitled in possession to an equitable estate in land in tail or for life now has all the powers given to a life tenant by the S. L. A. 1882. *Ante*, pp. 18—20.

Trust estates are, equally with legal estates, liable to involuntary alienation for debt.

Creation and Transfer.—Subject to the St. Frauds, trusts may be created and transferred without any particular ceremony or form. By that Statute all declarations of trusts in lands must be evidenced by some writing signed by the settlor or by his last will. S. 7.

All *assignments* of *any* trusts must be in writing signed by the party assigning or by his last will. Trusts which on any conveyance of land arise or are transferred by implication or construction of law are excepted from the Statute. S. 9. S. 8.

Devolution.—Under the L. T. A. 1897, equitable estates in fee simple devolve like legal estates. Before 1884 there was no escheat on failure of the heirs of the *c. q. t.*, but the trustee henceforth held the lands in his own right. Now, by the **Intestates' Estates Act, 1884,** the law of escheat applies just as to legal estates.

Trustees being invariably made joint tenants, on death of one the trust estate vests in the survivors. On the death of a sole surviving trustee, the legal estate passes to his personal representatives. C. A. 1881, s. 30.

The **appointment of new trustees** could formerly be made only with the concurrence of all the *c. q. t.*, being *sui juris*, or by the authority of the Ct. of Chancery, or under an express power contained in the settlement.

Now by the **Trustee Act, 1893,** where a trustee is dead or remains out of the United Kingdom for over twelve months, or desires to be discharged, or refuses to act, or S. 10.

This doctrine does not, however, extend to covenants imposing any active duty as to repair or lay out money on land (*Austerberry* v. *Oldham*, 29 Ch. D. 570).

is unfit to act or incapable of acting, a new appointment may be made, in writing, either by persons appointed for that purpose in the trust instrument or by the surviving or continuing trustee or the personal representatives of the last surviving or continuing trustee.

Retirement.—Formerly a trustee could retire only by consent of all the *c. q. t.*, being *sui juris*, or by the authority of the Ct., or by the appointment under an express or statutory power of a new trustee.

S. 11. Now by the **Trustee Act, 1893,** if there are *more than two* trustees, a trustee may, without appointment of a new trustee, retire by a declaration by *deed* of his wish to retire and consent by *deed* of his co-trustees and any other person empowered to appoint trustees.[1] On a fresh appointment, a conveyance to the new trustees was

S. 12. formerly necessary, but now by the same Act the transfer may be made by a *vesting declaration*, made in cases under s. 10 by the appointor and in cases under s. 11 by the retiring and continuing trustees and any other person with power to appoint trustees. Where the concurrence of a

Trustee Act, 1893, s. 26. Lunacy Act, 1911, s. 1. trustee cannot be obtained, *e.g.*, if he is a lunatic, infant, or cannot be found, a *vesting order* is made by the Chancery Division. A similar order may be made where new trustees are appointed by the Ct.

By the **Judicial Trustee Act, 1906,** the Ct. may, on the application of a person creating a trust, appoint a trustee under the control of the Ct. to act either as sole trustee or jointly with other trustees.

The **Public Trustee Act, 1906,** created a public trustee.

S. 2. He may act either alone or jointly with any private trustee

S. 5. or trustees. He may be appointed to be an original or a new or an additional trustee. He may be appointed

S. 4. custodian trustee, the trust property being transferred to him as if he were sole trustee, but its management remaining

S. 2. vested in the other trustees. He may also be appointed Judicial Trustee.

[1] When the public trustee has been appointed a trustee, a co-trustee may retire, though there are not more than two trustees, and without such cont ts (Public Trustee Act, 1906, s. 5 (2), see next paragraph).

CHAPTER IX.

OF A MODERN CONVEYANCE.

Lease and Release.—Though in early law the possession of a lessee was merely that of a bailiff, yet after entry by him the interest of the lessor was merely an incorporeal hereditament. If he wished to transfer it, feoffment with livery of seisin was impossible, and the only method was a deed of *release*, which transferred the freehold as effectively as a feoffment.

In early times this method of conveyance was much used, a lease for one or more years being made, and upon entry of the lessee the freehold being transferred to him by release.

After the St. Uses an analogous method was used which did not require entry, namely, **a bargain and sale** followed by a release. A., by verbal contract, bargained and sold his freehold to B., and by the doctrines of Chancery as soon as A. received the purchase money he was seised to the *use* of B., who thus by the Statute obtained without entry and without feoffment the actual seisin and possession.

This was put an end to by the **St. Enrolments** (27 Hen. VIII. c. 16), which required every bargain and sale of freeholds to be by deed enrolled. The Statute did not, however, apply to bargains and sales of *leaseholds*. It remained, therefore, possible for A., being seised in fee simple, to bargain and sell his lands for one year to B., and on receipt of any consideration, however small, B. under the St. Uses, without any actual entry, became possessed of an estate at law for one year. This being done, A. had merely to release by deed to B. and his heirs all his estate in the land, of which B. then became seised in fee simple.

This method was for over 200 years the common means of conveying lands. The St. Uses was employed only to give the lessee an estate at law without actual entry;

the release operated at C. L. and must contain apt words for marking out the estate granted.[1]

After the St. Frauds it was necessary that every bargain and sale should be in writing, as no pecuniary rent was ever reserved.

By an Act of 1841 it was provided that a deed of release should be effectual, although not preceded by a lease.

S. 2. By the **R. P. A. 1845,** it was enacted that all corporeal tenements and hereditaments, as regards the conveyance of the immediate freehold, should be in grant as well as in livery. Since then a simple deed of grant has superseded all other methods of transfer.

In such a deed there is still the same necessity that the estate of the grantee should be marked out. But in

S. 51. deeds executed after 1881, by the **C. A. 1881,** it is sufficient to use the words "in fee simple," or "in tail male," or "in tail female," without the words "heirs," "heirs of the body," &c. But either the old words or the exact words of the Act must be used. A conveyance to A. simply, or even to A. "in fee," without more would still give him merely a life estate.

Re Ethel and Mitchell and Butler, 1901, 1 Ch. 545.

In case of a grant—unless a consideration is expressed in the conveyance—it is still necessary that the conveyance should be made "unto and to the use of" the purchaser, otherwise the use, and by the Statute of Uses the legal estate, would *result* to the grantor.

The St. Uses was often employed to avoid the rule that a man cannot make a conveyance to himself.

Thus, before 1882, if A. wished to convey freehold to himself and B. jointly, he could only do so in *one* instrument by conveying to B. and his heirs *to the use* of A. and B. and their heirs. Otherwise he must first convey

S. 50. to C., who would reconvey to A. and B. But by the **C. A. 1881,** freehold land may be conveyed *directly* by A. to A. and B. *jointly*. If, however, A. wishes to convey to himself

[1] On a release, therefore, a use could be declared in favour of a third person so as to carry the legal estate to him, but any use declared upon a bargain and sale would be a use upon a use, and would create merely an equitable estate (*ante*, p. 30).

alone, *e.g.*, to convey a freehold estate to B., reserving a life interest to himself, he can still do this in one instrument only by the St. Uses, *e.g.*, by a conveyance to B. and his heirs to the use of A. for life, and after his decease to the use of B. and his heirs.

Registration.—To make a complete conveyance of lands in Middlesex or Yorkshire (including Kingston-upon-Hull) a memorial of the deed must by a statute of 1708 be registered in the county register. By this Act all deeds of conveyance were void against any subsequent purchaser or mortgagee who registered a memorial of the transfer to himself before registration of the first transfer. In equity, however, a person who so registered with notice of a prior unregistered assurance was a trustee of his legal estate for the first transferee.

This still prevails in Middlesex, but by the **Yorkshire Registry Act, 1884,** registration is optional, and all assurances have priority according to the date of registration, except in case of actual fraud, mere notice of a prior assurance having no effect.

By the **L. T. A. 1897,** it was provided that by Order in Council registration may be made compulsory in any county or district and necessary for the acquisition of the legal estate. This only applies to conveyances on sale, and does not prevent the equitable estate passing. Under this Act orders have been made in respect of the City and County of London.

Lands situated within the jurisdiction of the Middlesex Registry become exempt from such jurisdiction on being registered under the L. T. Acts of 1875 and 1897, and registration in the county register is unnecessary.

A *lease and release* was an *innocent conveyance*, the purchaser getting the fee by release, which never operated as of wrong, but simply passed the actual estate of the person making the release. The same applies to a deed of grant; in this the word "grant" is the proper term to employ, though other words may have the same effect.

A *feoffment with livery of seisin* may still be made subject to the rules already given, and an estate may still be

conveyed by *deed of bargain and sale enrolled* under the St. Enrolments.

Another possible method of conveyance is by *covenant to stand seised* of land to the use of another in consideration of blood or marriage. This also operates under the St. Uses.

A *release* is still the proper method of conveying an estate from a freeholder to one who is in actual possession. An *exchange* is now made by deed of grant or by order of the Board of Agriculture under the Inclosure Acts. *Surrender* of any estate other than copyhold or customary freehold must be by deed, except a surrender by operation of law.

Post, p. 69. Conveyances may also be made under *powers*, and, in case of registered land, by various statutory methods under the Land Transfer Acts.

CHAPTER X.

OF THE DESCENT OF AN ESTATE IN FEE SIMPLE.

The personal representatives of a deceased man are (i.) *executors* appointed by his will; (ii.) *administrators* appointed by the Court on intestacy. In them the whole of the deceased's *personal estate* vests at C. L., their duty being to apply it in payment of debts and to dispose of the surplus according to the will or the St. Distributions. To raise money for debts and legacies they have power to sell or mortgage any of the deceased's chattels, and their receipt is a good discharge to a purchaser or mortgagee, who need not inquire into the purposes of the sale.

Wills of personalty must be proved in the High Ct.,[1] and the probate copy is the only *evidence* of the executor's right to administer the estate. But his *title* depends upon the will; he may, therefore, before probate do ordinary acts of administration for which evidence of his title is not required. The administrator's title is derived

[1] See Part ii., Chap. XII.

from the grant of letters of administration, which, however, relate back to the death. The letters of administration are the evidence of his ti.

If one of several executors dies, the office survives to the rest. On death of a sole executor, his executor, if he has appointed one, becomes also executor of the first testator. But on death of a sole executor intestate or of an administrator, there must be a grant to an administrator *de bonis non administratis*. If a testator omits to appoint executors or if the executors whom he has appointed fail to take probate, an administrator *cum testamento annexo* must be appointed. If the sole executor is an infant, administration *durante minore ætate* is granted to his guardian or some person approved by the Ct.

Where there are several executors or administrators they are regarded as one person, each has an equal and entire interest over the whole personal estate, and the acts of one are deemed to be the acts of all.

Chattels specifically bequeathed pass to the executor, and do not vest in the legatee until the executor has assented, when they pass without any formality; before assent the legatee has merely a right to sue in equity for the administration of the estate and an equitable interest of which he can dispose, and which—if he dies before assent—will devolve upon his personal representatives.

Pecuniary and residuary legatees and persons entitled upon an intestacy have similar rights.

Realty at C. L. vested at once in the heir or devisee, but by the **Land Transfer Act, 1897,** real estate—except *legal*[1] estates in copyhold—which is vested in any person *without a right in any other person to take by survivorship*[2] vests in his P. R. like a chattel real, notwithstanding any testamentary disposition. The P. R. have the same powers over it as over a chattel real, save that—except by permission of the Court—all the executors *who have proved the will* must concur in transferring real estate. S. 1. S. 2, amended by C. A. 1911 s. 12.

Realty is to be administered for payment of debts, &c., S. 2.

[1] See *Re Somerville & Turner*, 1903, 2 Ch. 583.

[2] It is doubtful whether these words include or exclude an estate tail.

in the same way as personalty, but the order in which realty and personalty were formerly liable remains unchanged.

S. 2. Subject to the above the personal representatives hold the realty as trustees for the persons beneficially entitled; their title thus remains, but its nature is altered; the *legal* estate passes *in the first instance* to the personal representatives, and the heir or devisee has merely an *equitable* interest until they have conveyed to him or S. 3. have assented to a devise. Conveyance or assent may be made subject to a charge in respect of debts which the P. R. are liable to pay, and their liability then ceases. After one year the Ct. may order a conveyance to be made to the heir or devisee.

The Rules of Descent of a Fee on Intestacy since the Inheritance Act, 1833:

Ss. 1 and 2.
1. The stock of descent is the *last purchaser*, *i.e.*, the last person taking otherwise than by descent, escheat, partition, enclosure: from him the lands descend to his issue *in infinitum*.
2. Male issue is admitted before female.
3. Where there are males of equal degree of consanguinity to the purchaser the *eldest* only inherits. Females of equal degree take all together as *coparceners*, so called because at C. L. they were the only joint tenants who could compel partition.[1] There is no right of survivorship in coparcenary; the share of a coparcener descends like an interest in severalty.

Re Matson, 1907, 2 Ch. 509.

S. 6.
4. All lineal descendants *in infinitum* of any person deceased represent their ancestor.

These four rules complete the descent of an estate *tail* if not duly barred.

5. On failure of issue of the purchaser the inheritance goes to his nearest lineal ancestor.

6 and 8. Among ancestors the order is (i.) father and all male paternal ancestors of the purchaser and their descendants, the *nearest* taking first; (ii.)

S. 7 and 8.

[1] See as to the present law *ante*, p. 23.

female paternal ancestors and their heirs, the mother of the most *remote* male paternal ancestor and her heirs taking first; (iii.) mother and male maternal ancestors and their descendants, the mother taking first, then the *nearest male* maternal ancestors and their descendants; (iv.) female maternal ancestors and their heirs, the mother of the most *remote* male maternal ancestor and her heirs taking first.

7. The half-blood of the purchaser. (i.) if the common ancestor is a male, inherit after the whole blood of the same degree; (ii.) if the common ancestor is a female, take after her. S. 9.

9. If all heirs of the purchaser be dead the inheritance goes to the heirs of the *person last entitled*, *e.g.*, A. dies leaving an only son B. and no other descendants; B. dies intestate and without issue; B.'s *maternal* relatives will inherit. (22 & 23 *Vict.* c. 35, *ss.* 19, 20.)

These rules do not apply to personal estate.

Further, by s. 30 of the **C. A. 1881,** they do not apply to *freeholds* vested in a sole trustee or mortgagee, which always devolve on his personal representatives like a chattel real in spite of any testamentary disposition.

By the **Intestates' Estates Act, 1890,** where a man dies intestate and without issue his realty and personalty, if less than 500*l.* in net value at the time of his death,[1] vest in his widow absolutely. If more than 500*l.* she is entitled to a first charge of 500*l.* thereon, in addition to any other interest she may have in his real or personal estate.

[1] *Re Heath*, 1907, 2 Ch. 270.

CHAPTER XI.

OF A WILL OF LANDS.

BEFORE Hen. VIII. land could not be devised, except by virtue of some special custom, as in the case of gavelkind and lands held in burgage in certain boroughs. Indirectly, however, a devise might be effected by conveying the land to such uses as the person conveying might appoint by his will. This was rendered impossible by the St. Uses, but by the Sts. Wills, 1540 and 1542, tenants in fee simple were given the power of devising all their land held in socage and two-thirds of that held by knight's service. By 12 *Car. II. c.* 24, which made socage the universal tenure, the right of devising freeholds became universal.

S. 3. By the **Wills Act, 1837,** all estates and interests in real property which would otherwise descend to the heir

S. 9. are devisable. By this Act no will is valid unless (*a*) it is in writing signed at the foot or end by the testator or some person in his presence or by his direction; (*b*) the signature is made or acknowledged by the testator in the presence of two or more witnesses *present at the same time;* (*c*) the witnesses have attested and subscribed the will in the presence of the testator.

S. 7. No will made by a person under 21 is valid except certain wills of personalty. [Part ii., Chap. XII.]

By the St. Frauds, a bequest to a witness or his or her husband or wife rendered the signature of the witness

S. 15. invalid. Under the W. A. 1837, the signature is not invalid, but the *gift* is void.

Probate could not originally be granted of a will of realty alone; wills of realty and personalty required proof, but the probate was evidence only in respect of the personalty, the will itself being the only evidence in respect of the realty.

By the Ct. of Probate Act, 1857, the probate of a will was made admissible in case of a devise, and a devisee or heir might be cited to attend proceedings in the Ct. of

Probate, and would be bound thereby. Since 1875 these provisions apply to proceedings in the High Ct. By the **L. T. A. 1897,** probate may now be granted in respect of real estate only. S. 1.

See Part ii., Chap. XII.

A will may be revoked (i.) by marriage, except in one special case provided for by s. 18 of the Wills Act, 1837; (ii.) by destruction *with intent to revoke* either by the testator or some person in his presence and by his direction; S. 20. (iii.) by any writing executed in the same manner as a will and declaring an intent to revoke, or by a subsequent will S. 21. or codicil. Alterations in a will are inoperative unless executed in the same manner as a will, the signatures of the testator and the witnesses being either made in the margin opposite the alteration or annexed to a memorandum referring to the alteration.

A will is revoked also as to property parted with by the testator during his life, unless it becomes his again before his death.

Before the W. A. 1837, a will of lands was considered as a *present* conveyance to come into operation at death. Hence, if a man after devising lands parted with them, they would not, if re-acquired by him, become subject to his will, unless it was republished or revived. But, by s. 23 of the W. A., no subsequent conveyance prevents the operation of a will in respect of such devisable estate or interest as the testator had at his death.

See *Cox* v. *Bennett*, L. R. 6 Eq. 422.

By s. 24, every will is to be construed with regard to the property comprised in it as taking effect from the date of the death unless a contrary intention appears. Hence *after-acquired* realty may now pass under a will. For the same reason a residuary devise formerly included only land not disposed of at the time of the will, but not *lapsed* devises. Now, unless a contrary intent appears, it includes devises which have lapsed, or failed to take effect. S. 25.

Lapse occurs where a devisee dies in the lifetime of the testator, and cannot be prevented by the gift being made to the devisee and his heirs.

No lapse, however, occurs in case of gifts to two or more persons as *joint tenants* or as a *class*.

Also by virtue of the W. A. 1837, no lapse occurs—

(*a*) In case of a devise of realty to any person for an *estate tail* where such person dies in the life of the testator leaving issue who could inherit under such entail. **S. 32.**

(*b*) In case of a devise of more than a life estate or interest in realty or personalty to a *child or other issue* of the testator who dies in the life of the testator leaving children who survive the testator. **S. 33.**

Re Hensler, 19 Ch. D. 612; *Eager v. Furnivall*, 17 Ch. D. 115.

In both these cases the devise takes effect as if the death of the devisee had happened immediately after that of the testator.

Construction of Wills.—The great maxim of construction is that the intention of the testator ought to be observed; but this is largely qualified by the numerous rules of construction which have been established. Further, where technical terms are employed, they are in general construed strictly.

Technical terms are not, however, necessary in a will as in a deed if the intent is clear. Thus a gift to "A. and his issue," or to "A. and his seed," may be sufficient to create an estate tail.

By s. 28 of the W. A., where real estate is devised without words of limitation, it passes the fee simple or other the whole estate of the testator, unless a contrary intention appears.

By s. 29 a further change was made. Previously, if lands were devised to A., and "in case he shall die without issue" to B., the Courts construed this as a gift of an estate tail to A. Now, unless a contrary intention is expressed by the will, such words are to mean only a failure of issue in the lifetime or at the death of A., and not an indefinite failure of issue unless a contrary intent appears by the will. A. will therefore take a fee simple subject to an executory limitation over to B. on failure of issue. And by the C. A., 1882, s. 10, the executory limitation to B. will become void as soon as any issue of A. has attained the age of twenty-one.

The doctrine of *uses* and *trusts* applies to wills as well as to conveyances, and provisions are made by the W. A. for determining the estate taken by trustees.[1] Ss. 30 and 31.

If a testator devises land to his heir-at-law, such person takes as devisee and not by descent, *i.e.*, he becomes a *purchaser* and the stock of descent. Before the Act he took as heir. S. 3.

Originally, executors had no control over a devise of real estate unless the testator had given them any estate in or power over the same, *e.g.*, a power to sell for payment of his debts. By Lord St. Leonards' Act (22 & 23 *Vict.* c. 35), trustees in some cases, and in others executors, were empowered to sell realty when the testator had *charged* it with his debts or legacies. These provisions are now rendered unnecessary in the case of deaths after 1897 by the L. T. A. 1897. See *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 478.

Wills of lands situate in Middlesex and Yorkshire require **registration** within six months of the death if the testator dies in the United Kingdom, or three years if he dies outside it; otherwise they are void against any subsequent purchaser or mortgagee for valuable consideration. But in equity a purchaser or mortgagee with notice of a devise could not obtain priority by prior registration. By the **Vendor and Purchaser Act, 1874,** if such a will is not registered within the prescribed time an assurance from the devisee to a purchaser or mortgagee shall, if registered first, have priority over any assurance from the heir-at-law. By the **Yorkshire Registries Act, 1884,** wills of lands in Yorkshire *may* be registered and have priority according to the date of the death of the testator if registered within six months of the death, otherwise according to the date of registration. Similar provisions are made for the registration of an affidavit of intestacy. *Ante*, p. 37. S. 8.

Death Duties.—The following duties are payable by

[1] The Statute of Uses does not "of its own force apply to wills, the Statute of Wills having been subsequently passed, but testators are at liberty to employ the machinery of the statute for the purpose of manifesting their intention" (*Re Brooke*, 1894, 1 Ch. at p. 48; and cf. *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 478).

persons who succeed through death to realty or personalty either upon intestacy or by will or under a settlement.

1. Succession Duty—regulated chiefly by the Succession Duty Act, 1853, and the Finance Acts, 1894 and 1910—payable by successors to any beneficial interest in realty or personalty, except personalty chargeable with legacy duty. The rate varies with the relationship of the successor, being from 1 per cent. in case of lineal descendants, ancestors, and husband or wife to 10 per cent. in case of remote relatives and strangers. It is a debt due to the Crown from the successor and is a charge on his interest.

Exemptions.—The 1 per cent. duty is not payable when the estate does not exceed 15,000*l.* or when the value of the interest taken by the successor does not exceed 1,000*l.*, or 2,000*l.* in case of the widow or infant child of the deceased. No succession duty is payable where the value of the whole personal estate or interest taken is less than 100*l.*, or where the value of the whole estate is less than 1,000*l.* and *estate duty* has been paid.

2. Legacy Duty—regulated chiefly by the Legacy Duty Act, 1796, and the Finance Act, 1910—is payable by persons taking any personalty under a will, except leaseholds or legacies payable out of or charged on real estate, or the rent and profits or proceeds of sale or mortgage thereof, all of which pay succession duty. It is payable at the same rates as succession duty and subject to practically the same exemptions.

3. Estate Duty—regulated by the Finance Acts, 1894—1910—payable on the principal value of all real or personal property passing on the death of any person. Property passing on death includes property of which the deceased was competent to dispose and any property on which any interest existed ceasing on his death, to the extent of the benefit resulting by the cesser of such interest. It also includes property assured by the deceased during his life by various dispositions, as, *e.g.*, by a *donatio mortis causâ*, or by any gift not made *bonâ fide* three years before the death. It is payable by the P. R. and is a first charge on all personalty passing to them, except as against a purchaser

for value without notice. The rates vary from 1 per cent. on estates between 100*l.* and 500*l.* in value to 15 per cent. on estates over 1,000,000*l.* in value. When estate duty has once been paid it is not payable again until the death of some person competent to dispose of the property.

4. Settlement Estate Duty—regulated by the Finance Acts, 1894 and 1910—is an additional duty of 2 per cent. on the principal value of realty or personalty settled by the will of the deceased or settled by some other disposition taking effect after August 1st, 1894, and passing on the death of the deceased to some person not competent to dispose of it, except where the only life interest after the death of the deceased is that of the husband or wife of the deceased. It is not payable more than once during the continuance of the settlement.

5. Increment Value Duty—created by the Finance Act, 1910—payable at the rate of 20 per cent. on the increment value, as defined by the Act, of land or any interest in land passing on death.

CHAPTER XII.

OF CREDITORS' RIGHTS.

Liability for Judgment Debts.—Alienation of land for debts may take place either in the tenant's life or, in case of estates of inheritance, after his death. As regards **fee simple** lands, by the **St. Westminster II.** a creditor having obtained judgment might by a writ of *elegit* obtain one-half his debtor's lands in execution; and after so taking the lands in execution he might, and still may, hold them as tenant by *elegit* until the debt be satisfied out of the rents and profits.

Under this Statute it was held that a creditor might take out of the hands of a purchaser from the debtor one-half not only of lands sold after the judgment, but even of lands *acquired* and sold after the judgment. By the **Judgments Act, 1838,** *all* the debtor's lands might

be taken under a writ of *elegit*, and it was expressly provided that this should extend to all lands acquired after judgment, and that the judgment should be a *charge* on such lands, but should not affect purchasers, creditors, or mortgagees, unless *registered* according to the Statute.

Further changes were made by later Statutes, and now the effect of a judgment as a *charge* depends on the **Land Charges Act, 1900,** which provides that a judgment, whether obtained before or after the Act, shall not operate as a *charge* on land unless a *writ* or *order* for enforcing it is registered according to the provisions of the L. C. Act, 1888, in the Land Registry Office and re-registered every five years. By the **L. C. A. 1888,** every writ or order affecting land *and every delivery in execution* is void as against a purchaser for value of the land, unless the writ or order is registered in the Land Registry Office. A creditor, however, to whom land is actually delivered in execution may, by the **J. A. 1864,** obtain an order for its sale.

Lands in Middlesex are now subject to the L. C. A. 1900, and registration in the Middlesex register is unnecessary, but by the effect of the **Yorkshire Registry Act, 1884,** an execution creditor should register his writ in Yorkshire to gain undisputed priority over any subsequent assurance.

Judgments of County Cts. and other inferior Cts. must be removed into the High Court before they can affect freeholds.

Part ii., Chap. VII.

By the **Bankruptcy Act, 1883,** where a debtor is adjudged bankrupt the whole of his realty and personalty vests in the trustee in bankruptcy, who has a power to sell it and divide the proceeds among the creditors. So also when a debtor enters into a *composition* or *scheme of arrangement* with his creditors under the Bankruptcy laws his realty may by its terms be vested in the trustee appointed thereunder.

If a debtor enters into any *private* deed of arrangement with his creditors and assigns his property for their benefit *generally*, the assignment is void unless made in accordance with the **Deeds of Arrangement Act, 1887,** and the **Bank-**

Part ii., Chap. VII.

ruptcy and Deeds of Arrangement Act, 1913, and is also void against a purchaser for value of any land comprised therein, unless also registered in the debtor's name in the Land Registry Office under the **L. C. A. 1888.**

Fee simple estates are also subject **after death** of the tenant to his debts contracted in life. From Edw. I. the rule was established that where a debtor had by deed under seal (termed a *special* contract or *specialty*) bound his heirs with payment of any debt, the heir was liable to pay the debt to the extent of the value of any lands descended to him from his ancestor. Such lands were called *assets by descent.*

Apart from this creditors could only obtain payment out of lands where the debtor had by his will made them subject to his debts. In such cases the land was termed *equitable assets*, and the Cts. of Chancery allowed simple contract creditors to share equally with specialty creditors in the proceeds. *Ante*, p. 45.

A debtor might, however—even if he had bound his heirs by specialty—defeat his creditors by devising lands to some person other than his heir. In this case the creditors originally had no remedy, but by the **Sts. Fraudulent Devises** (3 *W. & M. c.* 14, 11 *Geo. IV. & 1 Will. IV. c.* 47), all such devises were made void against creditors by specialty in which the heirs were bound.

By **Lord Romilly's Act** (3 *& 4 Will. IV. c.* 104)—extending the provisions of an Act of 1807 which applied only to traders—all estates in fee simple which the owner had not by his will charged with or devised subject to payment of debts were made equitable assets, available for all creditors alike. But the order in which assets were liable for debts was unchanged, and the personal estate remains primarily liable; the effect of an actual charge or devise for payment of debts also remained the same.

Under this Act specialty creditors had priority over simple contract creditors, but this was taken away by **Hinde Palmer's Act** (32 *& 33 Vict. c.* 46).

Now under the **L. T. A. 1897,** realty is to be administered in the same manner as personalty, but the order of applica-

tion is still unaltered, and the effect of a charge on realty is the same.

The remedies of a creditor on the death of his debtor are either to sue the personal representatives at law, and obtain judgment against the goods of the deceased, or to apply for the administration by the Ct. of the debtor's estate. A specialty creditor might also sue the heir or devisee for the debt, and now, probably, under the L. T. A. any creditor may sue the personal representative and obtain execution out of the debtor's lands.

Part ii., Chaps. III. and VII.

Under the Bankruptcy Act, 1883, a creditor may, if the deceased was insolvent, obtain an order to have the estate administered *in bankruptcy*.

Crown Debts.—A Crown debtor's freeholds in fee simple may be seized in the hands of himself, his heirs or devisees. Formerly Crown debts, with some exceptions, formed a charge on the lands of the debtor, but they are now governed by the L. C. Acts, 1888 and 1900.

See *Re Holland*, 1902, 2 Ch. 360.

Conveyances of land or goods **for the purpose of delaying or defrauding creditors** are by **13 Eliz. c. 5,** void as against them, unless made for valuable consideration to a person taking in good faith and without notice of the fraud. Such conveyances are, therefore, of no avail against execution creditors, or a trustee in bankruptcy, or a creditor seeking to obtain payment after the death of the debtor.

Part ii., Chap. VII.

Conveyances and settlements of land may also in some cases be void against the trustee in bankruptcy of the settlor.

Estates tail could not originally be held under a writ of *elegit* for longer than the life of the tenant in tail against whom the judgment was obtained. But by the **J. A. 1833,** a judgment was made a charge on the lands as against the issue of the body of the debtor and any person whose interest he might have barred without the consent of any other person. Now estates tail are governed by the J. A. 1864, and the L. C. Acts, 1888 and 1900. An estate tail may also be barred and disposed of upon bankruptcy to the same extent as it might be for the debtor's own benefit. But if the debtor die without any judgment being obtained

against him, and not being insolvent, the lands cannot be made available to creditors except in case of certain Crown debts.

A **life estate** may be taken during the life of the life tenant, just as an estate in fee simple, and will vest in his trustee in bankruptcy; but it is not available after his death. Determinable life estates are not subject to the tenant's debts after their termination. Estates *pur autre vie* are liable to alienation for debt during life like other freeholds, and after his death continue liable for his debts during remainder of the life of the *c. q. v.*

Trust Estates.—(i.) Creditors may, under the **J. A. 1838,** obtain execution of all lands of which any person is seised or possessed in trust for the debtor at any time before or after judgment; (ii.) where the legal remedy by *elegit* is impossible they may obtain *equitable execution*, *i.e.*, the appointment by the Ct. of a receiver of the rents and profits of the debtor's equitable estates.

S. 11.

See *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275; and *Salt* v. *Cooper*, 16 Ch. D. 544

Trust estates are also governed by the J. A. 1864, and the L. C. Acts, 1888 and 1900, and can be made available in bankruptcy in the same way as legal estates. Trusts of fee simple lands descending to the heir were made *assets by descent* by the St. Frauds, and are now governed by the same statutes as legal estates and liable to the same extent for debts after death.

Trust estates are subject to Crown debts in the same way as estates at law. And in the case of equitable estates tail and for life the liability is the same as that of similar estates at law.

Lis Pendens.—Actions respecting lands bind a purchaser as well as the tenant's heir or devisee although he is ignorant thereof. But by the J. A. 1839, no *lis pendens* binds a purchaser or mortgagee unless registered and re-registered—now in the Land Registry Office—every five years.

CHAPTER XIII.

OF PERSONAL CAPACITY.

ALL natural persons are capable of purchasing and holding lands, and, as a general rule, of disposing of or making contracts with regard to land. To this rule there are, however, certain exceptions.

Infants.—The purchase of land by an infant is *voidable* within a reasonable time after his coming of age, but remains good until repudiated. A conveyance by an infant —except under the custom of gavelkind—is also as a rule *voidable*. But by the effect of the **Infants' Relief Act, 1874,** a conveyance by an infant of land or goods by mortgage to secure repayment of money lent is *void*.

See *Edwards* v. *Carter*, 1893, A. C. 360; and *Thurstan* v. *Nottingham, &c., Bdg. Socy.*, 1903, A. C. 6.

By the **Infants' Settlement Act, 1855,** a male not under twenty and a female not under seventeen may, with the sanction of the Ch. D., make a binding settlement of any property in consideration of marriage.

S. 1.

An infant's contract to purchase land is *voidable*.

During an infant's minority the custody of his estate is with his **guardians** *in socage* or *by statute*. The latter were created by 12 Car. II. c. 24, which on abolishing military tenure took away the right of wardship from the lords and gave the father the right of appointing by deed or will guardians to his children who were under age and unmarried.

Ante, p. 8.

By the **Guardianship of Infants Act, 1886,** on the death of the father of an infant the mother is guardian either alone or jointly with any guardian appointed by the father or the Ct. By the same Act a mother may appoint guardians to act after her own and the father's death, and where guardians are appointed by both father and mother they act jointly. Where these statutes do not apply the old law of wardship in socage remains. Guardians may also be appointed by the Ch. D. under its general jurisdiction.

S. 1.

By the **S. L. A. 1882,** the powers of an infant life tenant

Ss. 59, 60.

may be exercised by the trustees of the settlement or such other person as the Ct. may order.

Contracts of a person who is **insane** or too **drunk** to understand their effect are *voidable* if the other party knew of his condition. A voluntary conveyance of land by a person of unsound mind is *void*, if for valuable consideration it is *voidable* if the other party knew of his condition; otherwise it is valid. A voluntary conveyance by a drunkard may be confirmed when sober; if for valuable consideration the same rules apply as in the case of a person of unsound mind.

See *Imperial Loan Co.* v. *Stone*, 1892, 1 Q. B. 599.

The care of the property of idiots and lunatics is by the **Lunacy Act, 1890,** given to the Judge in Lunacy and entrusted to the *committee* of their estates or such other person as the judge may appoint.

Ss. 116 and 120.

Convicts are, by an Act of 1870, incapable of alienating or charging any property or making any contract, unless they are lawfully at large under a licence. An administrator of any convict's property may be appointed, in whom all his property will vest, revesting in the convict or his personal representatives on his pardon, completion of his punishment, death, or bankruptcy.

Aliens were formerly under incapacities, but by the **Naturalization Act, 1870,** may acquire, hold and dispose of every species of property in the same way as a natural-born British subject.

Corporations are fictitious bodies invested with the attributes of persons and having corporate names by which they can sue or be sued and hold property, but enjoying immortality through the perpetual succession of their members. Corporations were at C. L. under no incapacity, but by the Sts. Mortmain are in general unable to hold lands except by licence from the Crown or statutory authority. Thus every joint stock company under the Companies Act has power to hold lands, but no company formed for science, charity, &c., or any other object not involving the acquisition of gain, may hold more than two acres without the consent of the Board of Trade. The capacity of a corporation to alienate lands depends upon

Ante, p. 11.

its nature; many public and charitable corporations, *e.g.*, those subject to the Municipal Corporations Act, 1882, are restrained by statute from disposing of their lands.

Corporations created for specific purposes, *e.g.*, railway companies, cannot deal with their corporate property except for the purposes for which they were created. The capacity of a corporation to contract with respect to land is commensurate with its power of disposing of land.

A corporation could not stand seised of land to another's use. Hence on a grant of lands to a corporation to the use of another person, the legal estate remains in the corporation and is not transferred by the St. Uses. Since 1899 a corporation may hold property in joint tenancy; formerly a gift that would have rendered a natural person a joint tenant rendered a corporation a tenant in common.

CHAPTER XIV.

THE MUTUAL RIGHTS OF HUSBAND AND WIFE.

At C. L. husband and wife became by marriage one person. The husband became entitled to the whole of the rents and profits of the wife's land and acquired a freehold estate therein during coverture. He also acquired the absolute property in her goods and chattels and a joint seisin of her freeholds. Further, if he had issue by his wife born *that could possibly inherit her estate*, he had after her death for the remainder of his own life an estate by the curtesy in all the lands and tenements of which his wife was *solely seised* in fee simple or in fee tail *in possession*. [In gavelkind, the right extended to only one-half the wife's land and ceased on the husband's remarriage.]

The husband could, without the consent of the wife, dispose of the estate which he took by coverture or curtesy, and it was subject to his debts in his life. But he could make no disposition of her freeholds to endure beyond

his own interest; if the wife survived, she resumed her rights, which could not be defeated by his debts, or alienations.

If the husband survived, the wife's estates of inheritance descended to her heir or the heir of the purchaser, subject to the husband's estate by curtesy; she could make no disposition of them by will. As tenant by the curtesy, the husband now has the powers of leasing and sale given to a life tenant by the Settled Estates Act, 1877, and the S. L. Acts

Settled Estates Act, s. 46; S. L. A. 1882, s. 58; 1884, s. 3.

Husband and wife together might make any disposition of the wife's interest in real which she could make if unmarried. Formerly this was effected by a *fine*, the wife being separately examined as to whether she was acting of her own free will. By the **Fines and Recoveries Act**, 1833, a conveyance of land might be made by a married woman by deed executed with her husband's concurrence and acknowledged before a judge of one of the superior Cts., or of any County Court, or a Master in Chancery, or two commissioners, who were required to examine the wife separately as before the Act. Since 1882 an acknowledgment before one commissioner suffices.

S. 17.

1882,

Without a fine or a deed acknowledged under the Act of 1833 no conveyance could formerly be made of any married woman's estate at law.[1] And this remained the law with respect to those lands of women married before 1883 whose title accrued before 1883. But by the C. A. 1911, s. 7, the Ct. may, by judgment or order, bind a woman's interest in any property which she is by law unable to dispose of or bind.

At law, if lands were given to A. and B. (husband and wife) and their heirs, A. and B., being one person, took only one-half, not two-thirds, as joint tenants with C. And this rule still survives. So also if land was given to A. and B. (husband and wife) and their heirs, they took not as joint tenants but by **entireties**; neither without the consent of the other could dispose of any part of the

[1] But a married woman might be given a *power of appointment* enabling her to dispose of an estate in land (*post*, p. 69).

inheritance; unless they concurred in a disposition of it the survivor took the whole.

Again, at C. L. a man could not convey to his wife, but under the St. Uses he might convey to a third person to
S. 50. the *use* of his wife. And by the C. A. 1881, freehold may be conveyed by a husband or wife to the other either alone or jointly with any other person.

A man has always been able to devise lands to his wife.

In equity, if lands were held in trust for a wife for life or in fee simple or fee tail, but without a proviso for her separate benefit, the husband was entitled to receive the rents and profits, and acquired an equitable estate therein during coverture, subject to the wife's right in equity to have provision for her maintenance secured by a settlement of the rents and profits, or some part of them, in trust for that purpose. He also had the right to curtesy out of the wife's equitable estates of inheritance.

The wife's equitable estates could only be disposed of by both together in the same way as her legal estates.

In modern times, if property was vested in trustees on trust to apply the income for the *separate use* of a woman during coverture, the Cts. of Equity obliged the trustees to hold such income for the sole benefit of the wife, who enjoyed the same powers of disposition over it as if she were unmarried.

If the income of property was given directly to the wife for her separate use without any trustees, the Cts. of Equity compelled the husband to hold his rights in the income as trustee for the wife.

The Cts. further allowed property settled to the separate use of a married woman to be so tied down that she should have no power during coverture to anticipate or assign the income. When property is subject to this **restraint upon anticipation,** any attempted disposition during coverture of the *corpus* or of income *not yet accrued due* is void. The restraint ceases upon widowhood, but revives upon a second marriage, unless limited to her first marriage.

Not only income, but also the *corpus* of any property,

might be settled to a wife's separate use. And in 1865 it was settled that a gift of realty to a wife's separate use, with or without trustees, gave her power, without consent of her husband, to dispose of her whole *equitable* estate therein. This rule had been long established with regard to personalty. If the lands were vested in trustees for her separate use, she could require the trustees to convey the *legal* estate according to her directions; if there were no trustees, she conveyed by deed acknowledged, in which her husband was compelled to concur.

Hale v. *Waterhouse*, 5 Giff. 64.

Taylor v. *Meads*, 4 De G. J. & S. 597.

Also, if a wife made contracts with respect to her separate estate, her creditors might in equity have their claims satisfied out of any property which she was not restrained from anticipating.

It was finally settled that a husband should have **curtesy** out of the wife's separate equitable estates in fee if she died possessed thereof and intestate, but not if she disposed thereof in her life or by will.

Statutory Separate Property.—Originally a wife could have separate property only by act of parties, *e.g.*, by the express provision of those by whom the property was bestowed. The **Married Women's Property Act, 1870,** however, provided that certain kinds of property should always belong to wives for their separate use, and the **M. W. P. Act, 1882,** completely altered the capacity of married women by providing—

(1) that every married woman shall be capable of acquiring, holding, and disposing of any property as if she were a *feme sole*, without the intervention of any trustee **(S. 1)**;

(2) that every woman married *after* the Act is entitled to hold and dispose of as her separate property all property belonging to her at the time of marriage or acquired by or devolving upon her after marriage **(S. 2)**;

(3) that every woman married *before* the Act is entitled to hold and dispose of as her separate property all property to which her title has accrued after the Act **(S. 5)**.

See *Reid* v. *Reid*, 31 C. D. 402; and *Re Bacon*, 1907, 1 Ch. 475.

But the Act is not to interfere with any settlement nor to affect any restraint upon anticipation (**S. 9**). Now, however, under the Conveyancing Act, 1911, s. 7, a married woman's interest in property which is restrained from anticipation may, when it appears to be for her benefit, and with her consent, be bound by judgment or order of the Ct.

S. 1 amended by s. 1 of the M. W. P. Act, 1893.

The Act also gave married women the power to contract at law with respect to their separate property to which they are entitled without restraint on anticipation.

Part ii., Chap. XIII.

If real estate, which by this Act is the separate property of a wife, is limited to her directly, the legal estate vests in her alone, and the husband does not acquire any right or estate therein. And now, if realty is limited to trustees on trust for a wife, her *equitable* estate therein is her separate property, although no trust for her separate use has been imposed. Subject to the L. T. A. 1897, the husband may still have curtesy of the wife's separate property of which she died intestate.

A wife may now dispose during coverture of her statutory separate property in the same way as a single woman without the necessity of acknowledgment or of her husband's concurrence—*unless* she is restrained from anticipation. Similarly, she may devise any legal estate in fee simple which is her separate property under the Act. The old rule of construction, however, remains that in gifts to husband and wife and a third person, the former take only one-half as joint tenants or tenants in common. But on a gift to husband and wife after 1882 they take as joint tenants and not by entireties.

Under the S. L. A. 1882, if a married woman tenant for life of land is entitled for her separate use, or as her separate property, she may exercise the powers given by the Act without her husband; otherwise she and her husband exercise them. Restraint on anticipation does not prevent the exercise of such powers.

S. 61.

1882, ss. 1, 18, 24; 1907, s. 1.

By the M. W. P. Acts, 1882 and 1907, a married woman may, without the concurrence of her husband, dispose of

any realty or personalty held by her as trustee or P. R. as if she were a *feme sole*.

Rights of Wife in Husband's Lands.—During the husband's life the wife obtained no interest in his land, but at his death she became in some cases entitled to a life interest in part thereof. Before the Dower Act, 1833, if at any time during coverture the husband was *solely* seised of a *legal* estate of inheritance in possession in lands to which any issue which the wife *might* have had *might* have been heir, she was entitled at his death to have one-third[1] of the lands allotted to her to be enjoyed in severalty during the rest of her life. This right having once attached to lands, was independent of the husband's debts, and could not be defeated by any sale or devise by him unless the wife concurred therein and released her right. At C. L. this release could be effected only by *fine*, but under the Fines and Recoveries Act by *deed acknowledged*.

Dower might be prevented from attaching to newly-purchased lands by means of "*uses to bar dower*," *i.e.*, the purchaser taking a conveyance upon such *uses* that he could never become seised of an estate to which it would attach.

The right might also be barred by the wife's acceptance before marriage of a **jointure** in lieu of dower. *Legal* jointure was first authorised by the St. Uses, under which dower might be barred by the wife's acceptance *before* marriage, and in satisfaction of dower of a competent livelihood of freehold, to take effect in profit or possession presently after the death of the husband for at least the life of the wife. If jointure was made after marriage, the wife must elect between jointure and dower. If, however, the wife was of full age and a party to the settlement, she might *in equity* extinguish her title to dower on any [illegible].

By the **Dower Act, 1833,** no widow is entitled to dower out of any land disposed of by the husband in his life or by will, or in which he has devised any estate or interest for her benefit, unless a contrary intent appear by the will. S. 4.

[1] In gavelkind her right was to one-half while unmarried and chaste.

S. 5. And all interests and charges created by the husband, and all debts and encumbrances, are effectual to bar dower.

Ss. 6—8. He may also bar dower by any declaration or deed or by will; but the wife is given a right to dower out of lands to which the husband had merely a right and no legal

Ss. 2, 3. seisin, and out of equitable estates except those of which he was joint tenant. The effect of the Act is to deprive the wife of her dower except as against the heir-at-law. The

Ante, p. 41. charge given to a wife by the Intestates Estates Act, 1890, must first be satisfied before she claims her dower.

S. 46. A tenant in dower has the powers of leasing given to a life tenant under the Settled Estates Act, 1877, but not the powers given under the S. L. A. 1882.

CHAPTER XV.

OF REVERSIONS AND VESTED REMAINDERS.

Reversions and Vested Remainders.—If A., being tenant in fee simple, grants to B. a less estate than his own, *e.g.*, a lease for life or an estate tail, he disposes of a *particular* estate, *i.e.*, a part of his estate in fee, upon the determination of which estate the possession of the land will *revert* to himself or his heirs. During the continuance of the particular estate the interest of A. is termed a **reversion.** If A., having granted a particular estate to B., at the same time grants all or any part of his reversion to C., the estate so granted is termed a **remainder.** A remainder arises by express grant; a reversion simply by act of law.

See *Re Harrison and Bottomley*, 1899, 1 Ch. at 475.

A Reversion on a Lease for Years.—If A., being tenant in fee simple, grants merely a lease for *years*, he does not part with his feudal possession, and may therefore convey his reversion by feoffment with livery of seisin; but, as he parts with the actual possession, his estate is strictly incorporeal, and might therefore also be granted by deed.

But if A. grants a lease for *life*, that being an estate of freehold, he parts with his seisin, and his reversion being purely incorporeal, could be conveyed only by deed of grant.

THINGS PRIVILEGED FROM DISTRESS FOR RENT SERVICE.

I.—Things absolutely privileged:—

(A) At common law—

(1) Fixtures;
(2) Things which cannot be restored in as good plight as when taken;
(3) Animals *ferœ naturæ*;
(4) Things in actual use;
(5) Things delivered to a person exercising a public trade, to be carried, wrought, worked up or managed in the way of his trade;
(6) Things in the custody of the law;
(7) Things belonging to the Crown;
(8) Money, if not in a sealed bag or other closed receptacle, which can be identified;
(9) Beasts that stray on to the land through the default of the tenant or landlord thereof (as by not maintaining proper fences), until they have been *levant* and *couchant* on the land.

(B) By statute—

(10) The goods of an ambassador; 7 Anne, c. 12, s. 3.
(11) Machines, materials, tools or apparatus used in the textile manufactures as specified in the Hosiery Act, 1843, and not belonging to the tenant; 6 & 7 Vict. c. 40, ss. 18, 19, 34, 35.
(12) Gas meters and fittings, water pipes, meters and apparatus, and electric light meters, fittings and apparatus not belonging to the tenant, but supplied by the gas, water or electric lighting company or other statutory "undertakers," subject to the provisions of the Gasworks Clauses Acts, 1847 or 1871, the Waterworks Clauses Acts, 1847 or 1863, or the Electric Lighting Acts, 1882 or 1909; stats. 10 & 11 Vict. c. 15, s. 14; 34 & 35 Vict. c. 41, s. 18; 10 & 11 Vict. c. 17, s. 44; 26 & 27 Vict. c. 93, s. 14; 45 & 46 Vict. c. 56, s. 25; 9 Edw. VII. c. 34, s. 16.
(13) Railway rolling stock not belonging to the tenant as provided in the Railway Rolling Stock Protection Act, 1872; 35 & 36 Vict. c. 50, s. 3.
(14) The wearing apparel and bedding of the tenant and his family and the tools and implements of his trade to the value (in all) of £5; Law of Distress Amendment Act, 1888, s. 4, referring to 51 & 52 Vict. c. 43, s. 147.
(15) On holdings subject to the Agricultural Holdings Act, 1908, agricultural or other machinery not belonging to the tenant and being on the holding under an agreement with him for the hire or use thereof in the conduct of his business, and live stock not belonging to the tenant and being on the holding solely for breeding purposes; stat. 8 Edw. VII. c. 28, ss. 29 (4), 48 (1).
(16) Subject to observance of the conditions specified in the Law of Distress Amendment Act, 1908 (ss. 1, 4, 5), as to serving on the landlord a declaration of ownership and otherwise, the goods of—

(*a*) any under-tenant liable to pay by equal instalments not less often than every actual or customary quarter of a year a rent which would return in any whole year the full annual value of the premises or of such part thereof as is comprised in the under-tenancy;
(*b*) any lodger;
(*c*) any other person whatsoever not being a tenant of the premises or of any part thereof and not having any beneficial interest in any tenancy of the premises or any part thereof.

But this Act does not apply to—

(i.) goods belonging to the husband or wife of the tenant whose rent is in arrear, or
(ii.) goods comprised in any bill of sale, hire-purchase agreement or settlement made by such tenant (or tenant's wife, *Rogers* v. *Martin*, 1911, 1 K. B. 19), or
(iii.) goods in the possession, order or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof, or
(iv.) any live stock to which s. 29 of the Agricultural Holdings Act, 1908, applies, or
(v.) goods of a partner of the immediate tenant, or
(vi.) goods (not being goods of a lodger) upon premises where any trade or business is carried on in which both the immediate tenant and the under-tenant have an interest, or
(vii.) goods (not being goods of a lodger) on premises used as offices or warehouses where the owner of the goods neglects for one calendar month after notice to remove the goods and vacate the premises, or
(viii.) goods belonging to and in the offices of any company or corporation on premises the immediate tenant whereof is a director or officer, or in the employment of such company or corporation, or
(ix.) any under-tenant, where the under-tenancy has been created in breach of any covenant or agreement in writing between the landlord and his immediate tenant, or where the under-tenancy has been created under a lease existing at the date of the passing of the Act contrary to the wish of the landlord in that behalf, expressed in writing and delivered at the premises within a reasonable time after the circumstances have come, or with due diligence would have come, to his knowledge.

II.—Things privileged conditionally only, if there be no other sufficient distress on the premises:—

(A) At common law—

(1) Tools and instruments of a man's trade or profession and implements of husbandry, though not in actual use;
(2) Beasts of the plough and sheep.

(B) By statute—

(3) On holdings subject to the Agricultural Holdings Act, 1908, live stock belonging to another person and taken in by the tenant to be fed at a fair price; 8 Edw. VII. c. 28, s. 29 (1).

At common law growing crops and sheaves or cocks of corn were not distrainable. But sheaves or cocks of corn, or corn loose or in the straw, or hay lying in any barn or granary, or upon any hovel, stack or rick, or otherwise upon any part of the land charged with the rent were made distrainable by stat. 2 Wm. & Mary, sess. 1, c. 5, s. 3. And all sorts of corn and grass, hops, roots, fruit, pulse or other product growing on any part of the land demised were made distrainable by 11 Geo. II. c. 19, ss. 8, 9.

The same things are protected by the common law against distress for a rentcharge as are privileged from distress for rent service. But with respect to statutory protection, it appears to be a question in each case whether the words of the particular Act extend to alter the common law respecting, and to confer protection against distress for a rentcharge as well as distress for rent service, and whether a landowner is enabled, upon the grant of a rent with power of distress, to confer any larger power of distress than is at the time of the grant available by law to recover arrears of rent service; see *Miller* v. *Green*, 8 Bing. 92, 107; *Johnson* v. *Faulkner*, 2 Q. B. 925, 934, 935. The Law of Distress Amendment Act, 1888, applies in terms to "distress for rent" (without express qualification); but the Law of Distress Amendment Act, 1908, applies in terms only to distresses levied by a landlord or superior landlord.

Leading cases on C. L. privilege are: *Simpson* v. *Hartopp*, Willes, 512; *Gilman* v. *Elton*, 3 Brod. & Bing. 75; *Piggott* v. *Butler*, 1 M. & W. 411.

[*To face p.* 61.

In the case of a lease for years, upon entry by the lessee, tenure—though not strictly free tenure—exists; the **rent** reserved is rent service, and is recoverable by distress like rent due from a freeholder. For reservation of rent service a deed was formerly not necessary; by the R. P. A. 1845, a lease which is required by law, the St. Frauds, to be in writing is void unless made by deed. S. 3.

The C. L. remedy of **distress** was merely by seizing and impounding goods of the tenant or any other person found on any part of the premises; *sale* of goods seized was first authorized by 2 *W. & M. c.* 5. By the **Law of Distress Amendment Act, 1908,** the goods of under-tenants, lodgers, and others, are protected.[1] The remedy of distress belongs to the landlord at C. L. without express agreement, as also his right to sue the tenant personally for the rent.

Leases usually contain a condition of **re-entry** empowering the landlord, on default of payment of rent, to re-enter and determine the estate of the tenant. At C. L., before entry could be made or action brought on such a condition, the landlord was required to make a formal demand upon the premises of the exact rent due on the last day on which it could be paid. But by the **C. L. P. A. 1852,** if half a year's rent be in arrear and no sufficient distress be found,[2] the landlord may, at the end of the period limited for re-entry, recover the premises by action without formal demand or re-entry. All proceedings must, however, cease if the tenant (including an under-tenant) at any time before trial pays all arrears and costs. By s. 42 of the same statute the tenant may apply for relief in equity within six months after recovery in ejectment. And by the **C. L. P. A. 1860** the same relief may be given by Cts. of Law. Under s. 212 of the C. L. P. A. 1852, relief may be given where the landlord has recovered the premises by entry and not by action.[3] S. 210. S. 1.

A condition of re-entry was formerly inalienable, but by

[1] A list of things privileged from distress is given in the annexed table.

[2] *Thomas* v. *Lulham*, 1895, 2 Q. B. 400; but see *Richett* v. *Green*, 1910, 1 K. B. 253.

[3] *Howard* v. *Fanshawe*, 1895, 2 Ch. 581.

S. 10. **32 *Hen. VIII. c.* 34, it was provided that it should pass to the assignees, heirs, &c. of the lessor. And by the C. A. 1881, applying only to leases after 1881, it is provided that every condition contained in a lease shall be annexed to the reversionary estate in the land, and be enforceable by the reversioner.**

Rent service being incident to the reversion passes upon the grant thereof. Formerly no grant could be made of a reversion—except by fine—without the consent of the tenant and his **attornment** to the grantee. This was abolished by 4 *& 5 Anne, c.* 3, *s.* 9, and the conveyance of a rent service is now effected by a grant by deed of the reversion. If such a conveyance is made to the tenant himself it is a *release*.

At C. L., rent service might be lost by the destruction of the reversion, *e.g.*, if A. was tenant of lands for a term of years, and B., his under-tenant, for a shorter term, the rent due by B. to A. was an incident of A.'s reversion. If A. obtained the immediate fee simple, his term of years could not co-exist with but *merged*[1] into the larger estate, and the term being gone its incidents, including B.'s rent, dis-

S. 9. appeared. Now, in such a case, by the **R. P. A. 1845,** the incidents of the vanished term would attach to the fee simple, which is deemed to be the reversion expectant on the lease of B.

Remainders.—Between the owner of the particular estate and the remainderman no tenure exists, both deriving their estates from the same source, the grant of the owner in fee simple. There being no tenure no rent service is, therefore, incident to a remainder.

A tenant in fee simple having the power to make a lease for years or for life, or a gift in tail or in fee simple, may create all these estates at the same time by limiting them to different grantees successively in any order, provided that the grantee of the fee simple takes last. Thus he may grant to A. for life, and after his decease to B. for life, and

[1] Whenever a greater estate and a less meet in the same person without any intermediate vested estate, the lesser is said to be merged or drowned in the greater.

after his decease to C. in fee simple, and before or after or between the grants to A. and B. he may grant estates tail or for years to other persons.

Where numerous estates are granted in this way it is probable that many of the grantees will obtain no benefit, *e.g.*, if A. survive B. the latter can take nothing. Yet B. has an estate for life in remainder immediately vested in him which he can transfer by deed of grant like a reversion. *Whenever any estate is always ready from its commencement to come into possession the moment the prior estates determine it is termed a* **vested remainder.** The gift is immediate, but its enjoyment is postponed to the determination of the prior estates.

It is possible for one person to have more than one estate in the same land at the same time. The limitation of a remainder in fee tail or fee simple to a person who already has an estate of freehold, *e.g.*, for life, is governed by the **Rule in Shelley's Case,** which is, that *when an ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is "limited either mediately or immediately to his heirs in fee or in tail, the words 'heirs' or 'heirs of the body' are words of limitation and not of purchase"*; that is, the heir takes merely by descent and has no separate or independent estate.

This rule was derived as follows:—The grantee of an hereditary fief was originally considered as entitled for his life only; a tenant in fee simple was a person holding to him and his heirs and could not prevent the estate descending to his heirs. A gift expressly made to A. for his life, and after his decease to his heirs, was, therefore, considered identical with a gift to A. and his heirs, that is, a gift in fee simple. Similarly a grant to A. for his life, and after his decease to the heirs of his body, gave him an estate tail. Later, a tenant in fee or in tail acquired a right of alienation, but such words retained their effect of creating a fee simple or fee tail, and the words heirs or heirs of the body, which formerly gave an independent estate to the heirs, became merely words of limitation, marking out the estate of the grantee.

See *Van Grutten* v. *Foxwell*, 1897, A. C. 658.

Ante, p. 10.

The same rule applied, even though an estate to some other person is interposed between the gift to A. and that to his heirs, *e.g.*, if lands were limited to A. for his life, and after his decease to B. for his life, and after his decease to the heirs of A. The heir claims only through his ancestor, who from the mere fact of having an estate which goes to his heirs can defeat their expectation, and, subject to B.'s life interest, can dispose of the whole estate. A., as long as B. lives, has two estates, an estate for life in possession, and an estate in fee simple in remainder, expectant on the decease of B. If B. dies in A.'s life, A. becomes tenant for his own life, with immediate remainder to his own heirs, *i.e.*, he is tenant to himself and his heirs.

The same rule would apply if the remainder were to the heirs of the body of A.; the limitation to the heirs of the body of A. would coalesce with his life estate and give him an estate tail in remainder, expectant on the decease of B., and if B. died in his lifetime A. would become a tenant in tail in possession.

The same rules apply, however many intermediate estates are between that of the ancestor and the heirs, and even though some are estates in tail. Thus, if lands are given to A. for life, and after his decease to B. and the heirs of his body, and in default of such issue to the heirs of A., in such a case A. will have an estate for life in possession with an estate in fee simple in remainder, expectant on the determination of B.'s estate tail.

The same principles apply if the first estate is an estate tail.

The rule in *Shelley's Case* requires merely that an estate of *freehold* be taken by the ancestor, and not necessarily an estate for the whole of his life. Thus, if lands are given to A., a widow, during her life, provided she remain unmarried, and after her marriage to B. and his heirs during her life, and after her decease to her heirs, here A. has an estate in fee simple, subject to the remainder to B. for her life should she remarry.

But if the ancestor takes no estate of freehold the rule does not apply; if land is granted simply to the heirs of A.,

A. takes no estate by the gift, which is a gift of a future contingent estate to the persons who at A.'s death may be his heirs.

A reversion or vested remainder in fee simple is alienable by deed of grant or by will, and on intestacy it descends—subject to the L. T. A. 1897—to the heir of the last purchaser just as an estate in fee simple. An *estate tail* in remainder cannot in general be barred without the consent of the protector of the settlement, is not devisable and descends like a fee tail in possession.

Reversion Duty.—Under the Finance Act, 1910, a duty called *reversion duty* is, with certain exceptions, charged on the value of the benefit accruing to the lessor by reason of the determination of any lease or underlease of land. Reversion duty is a Crown debt payable by the person in whom the lessor's interest was vested.

CHAPTER XVI.

OF A CONTINGENT REMAINDER.

With certain restrictions, a tenant in fee simple may grant estates to commence in *interest* and not merely in possession at a future time. In such a case the land becomes inalienable, and is tied up for the benefit of the future owners, for until the future estates come into existence they have no owners to convey them.

Future estates are (i.) **contingent remainders,** which can be created by any kind of conveyance; (ii.) **executory interests,** which can only arise by a will, or a use executed by the St. Uses.

Contingent remainders were long regarded as illegal, but the rule was gradually relaxed, and by the time of Coke the validity of a gift in remainder to become vested on some future contingency was established.

A **contingent remainder,** as distinct from an executory interest, is an estate which waits for the determination of the preceding estate; but as distinct from a vested remainder,

it is one which is *not* always ready to come into possession directly the particular estate determines. Immediately it is ready to come into possession it ceases to be contingent. Thus, suppose a gift to A., a bachelor, for life, and on determination of that estate by forfeiture or otherwise in his life to B. and his heirs during the life of A., and after the decease of A. to the eldest son of A. and the heirs of the body of such son. Here B.'s estate, though small, is vested, always ready to come into possession, but the estate tail to the eldest son of A. is contingent, and depends upon A.'s having a son. As soon, however, as a son is born, the remainder is vested.

The first rule for the creation of contingent remainders is that **the seisin must never be without an owner**; every contingent remainder of freehold must have a particular estate of freehold to support it. Freehold could not be conveyed otherwise than by delivery of seisin; if on any feoffment the feudal possession was not parted with, it remained in the grantor. Thus, a conveyance made to-day to A. to hold from to-morrow would be void. Again, suppose a feoffment made to A. for his life and after his decease and one day, to B. and his heirs; here, on the death of A. the feudal possession reverts to the grantor, and cannot be taken out of him without a fresh conveyance, hence the gift to B. and his heirs is void. Again, if an estate be limited to A., a bachelor, for his life, and after his decease to his eldest son in tail, the son must be ready at once at A.'s death to take. But a child *en ventre sa mère* may now take an estate as if born.

The result of the first rule is that *every contingent remainder must become vested during the continuance of the particular estate or on the very instant that it determines, otherwise it will fail.* Thus, if land be given to A. for his life, and after his decease to such son of A. as shall attain twenty-four, if no son of A. has attained twenty-four at A.'s death, the gift will fail altogether. However, an Act of 1877 now saves certain contingent remainders from failure.

See *White* v. *Summers*, 1908, 1 Ch. 255.

Post, p. 74.

A contingent remainder may be such that the future expectant owner is now living, *e.g.*, conveyance to A. for

his life, and if C. be living at A.'s death, then to B. and his heirs. The estate of B. is a future estate *not* always ready to come into possession, for if A. die after C., B. or his heirs can take nothing. B.'s chance is termed a *possibility*, and could not originally be transferred; it might, however, be barred by deed, and might be released by B. to the reversioner. A contingent remainder limited to a living person and his heirs would descend on intestacy like a vested remainder, it was and still is devisable, and is now governed by the L. T. A. 1897.

By the R. P. A. 1845, a contingent interest and a possibility, coupled with an interest in any tenements or hereditaments of any tenure, may be disposed of by deed. S. 6.

Destruction of Contingent Remainders.—A contingent remainder was liable to destruction by the sudden determination of the particular estate on which it depended.

Thus, suppose lands given to A., a bachelor, for his life, and after his decease to his eldest son, C., and the heirs of his body, and, in default of such issue, to B. and his heirs. If A., before the birth of a son, *forfeited* his life estate, the contingent remainder to C. would be destroyed by the letting into possession the estate of [illegible].

So also the possession of the remainder in fee simple would have been accelerated, and the contingent remainder destroyed if A. purchased B.'s remainder, and had it conveyed to him before the birth of a son, as the mere contingent remainder would not have prevented the *merger* of the life estate in the remainder in fee. *Ante*, p. 62, n.

In the same way the sale (*surrender*) by A. of his life estate to B. would have destroyed the contingent remainder.

The **R. P. A. 1845** provides, however, that a contingent remainder shall not be liable to destruction through the determination of a prior estate by *forfeiture*, *surrender or merger*, though, subject to the Act of 1877 (which also saves the contingent remainders to which it applies from destruction by *disclaimer* of the particular estate), it will still fail if not ready to come into possession when the particular estate would naturally have expired, or did naturally expire. S. 8. *Post*, p. 74.

The destruction of a contingent remainder might be obviated by giving an estate after the determination of A.'s interest in his life to trustees and their heirs, during the life of A., as *trustees to preserve contingent remainders.* This vested estate interposed between the estates of A. and B. prevented their union, and so prevented the remainder in fee simple from coming into possession.

Contingent remainders of **trust estates** were indestructible as the feudal possession remained with the trustees. Thus, if a conveyance was made unto *and to the use of* A. and his heirs in trust for B. for life, and after his decease in trust for his first and other sons successively in tail, here the whole legal estate was vested in A., and nothing done by B. could destroy the contingent remainder.

CHAPTER XVII.

OF AN EXECUTORY INTEREST.

EXECUTORY interests are future estates which are indestructible, which do not depend upon but may put an end to prior estates.

Executory interests created under the St. Uses are *springing* or *shifting uses.* Before the statute if a feoffment were made to A. and his heirs to the *use* of B. and his heirs *from to-morrow* the Court would, contrary to the rules of law, enforce the use. Here was a springing use, creating a future estate, arising of its own strength and not dependent on a prior estate. The same rule was followed after the St. Uses, and the legal seisin of lands might thus be shifted from one person to another without formalities. Thus, in a marriage settlement, if A. be the settlor, the lands are conveyed by him before the marriage to trustees (B. and C.) and their heirs to the use of A. and his heirs, until the marriage, and thereafter to the uses of the settlement, *e.g.*, to D., the husband, for his life, and so on. Here B. and C. take no permanent estate; A.

continues tenant in fee simple until the marriage, on which the seisin at once shifts from him to D. The interest of D., though future and contingent on marriage, is not a remainder, since it is to come after a fee simple, nor does it wait the determination of a prior estate. The use to D. springs up on the marriage and destroys the fee simple of A.

By means of a use a future estate can be made to spring up at any time. Where, however, a future estate must wait for the determination of a preceding estate it is always a contingent remainder: nothing which can be regarded as a remainder will ever be construed as an executory limitation.

Re Wrighteson, 1904, 2 Ch. 95; *White* v. *Summers*, 1908, 2 Ch. 256.

Powers are methods of causing a use with its accompanying estate to spring up at the will of any person. Thus land[1] may be conveyed to A. and his heirs to such uses as B. shall appoint, and in default of and until such appointment to the use of C. and his heirs. Here B., though not owner of the property, has the power to dispose of it, and may appoint to the use of himself and his heirs.

And such a *general power of appointment* is so nearly equal to ownership, that, except where it is exercisable by will only, the land subject thereto can be seized by B.'s creditors in his life under the J. A. 1838, and the power may be exercised for their benefit by B.'s trustee in bankruptcy. If the power is exercised in favour of a person not claiming for valuable consideration, the lands will also be liable for B.'s debts after his death.

Bankruptcy Act, 1883, s. 44; and see *Re Gwedalla*, 1905, 2 Ch. 331.

But, apart from the above, if B. dies without making any appointment C. becomes indefeasibly entitled to the lands. Where a general power of appointment over realty is exercised by will the lands now vest in the executors under the L. T. A. 1897.

S. 1.

If, however, B. exercises his power and appoints the lands to use of D. and his heirs, D., by virtue of the *use* appointed in his favour, has at once an estate in fee simple in possession, and the estate of C. is at an end. The only power of B. is over the *use;* if, therefore, B. were to make an

[1] As to powers in relation to personal property, see, further, Part ii., Chap. X.

appointment to D. and his heirs *to the use of* E. and his heirs, D. would still have the use and the legal estate, though he would be a trustee thereof for E.

In exercising a power, the terms thereof and all the formalities required by it must be observed; if the power requires a will, it cannot be exercised by deed nor *vice versâ*.

S. 12. But by Ld. St. Leonards' Act, 1859, a deed executed before and attested by two or more witnesses in the ordinary manner is a valid execution of any power of appointment by deed, although other formalities may have been directed by the instrument creating the power. This Act, however, only refers to the *mode* of execution and attestation; any other directions, *e.g.*, as to obtaining the consent of any person, must be observed.

Where, however, the intended appointee is a purchaser from the person intending to exercise the power, or is his creditor, wife, or child, or is a charity, Equity will relieve against the defective execution of a power.

Powers of appointment by will must be made in accordance with the W. A. 1837, and if so made are valid, though some other formality or different form of execution was required.

A man might always exercise a power of appointment in favour of himself or his wife, though he could not directly convey to himself or, before 1882, to his wife. A married woman might exercise a power of appointment without the consent of her husband. And—unless expressly forbidden—an infant may, under the I. S. A. 1855, make a valid appointment.

Ante, p. 52.

S. 27. By the W. A. 1837, a general devise of the real estate *or* personal estate of a testator includes realty or personalty over which he has a general power of appointment, unless a contrary intention appears in the will.

A power of appointment may exist with ownership, *e.g.*, where land is limited to such uses as A. shall appoint, and in default of such appointment to A. and his heirs. Here A. may dispose of the land either by exercising the power when his estate is destroyed or by conveying his estate when the power is extinguished.

Special Powers.—The estate to arise on the exercise of a power may be limited. Thus, where the estate of a life tenant was limited to him by way *of use*, a power might be conferred on him of leasing the land for any number of years. On the exercise of such a power, a use with its accompanying estate would arise to the tenant quite independently of the continuance of the life of the tenant for life. If the life tenant did not conform with the terms of the power, the lease was void, but by the Leases Act of 1849, if made *bonâ fide*, and if the lessee has entered, it is good in equity as a contract for a grant of a valid lease under the power. Express powers of leasing may still be created, but are largely superseded by the powers given by the S. L. A. 1882. Powers of *sale and exchange* were also commonly inserted in settlements, the trustees having power for that purpose to *revoke* the uses of the settlement as to the lands so sold, &c., and to appoint to such uses as might be necessary. But it was provided that any money arising on sale or exchange should be laid out in other lands to be settled to the uses of the land, and this direction made the money real estate in equity, and the parties entitled under the setttlement took the same estates therein as if actually so laid out. Such express powers are now unnecessary, owing to the S. L. A. 1882.[1]

Extinguishment of Powers.—Powers may be extinguished by deed of release made by the donee of the power to any person having any estate of freehold in the land. By the C. A. 1881, a person to whom any power is given may by deed release it or contract not to exercise it. But the Statute does not apply where the *duty* of the donee may require him to exercise it at some future time, *i.e.*, where it is coupled with a trust. s. 52.

By the Fines and Recoveries Act, 1833, a married woman may, with the concurrence of her husband by deed acknowledged, release any power as if she were a *feme sole*. s. 77.

A power may, under the C. A. 1892, be disclaimed by deed. s. 6.

The above rules do not, however, apply to *statutory* powers.

[1] As to powers of *maintenance*, see Part ii., Chap. X.

Executory Interests may be also created by Will.—The earliest instances probably occurred in directions that executors should sell lands devisable by custom. The sale operated as the execution of a power by the testators to dispose of the freeholds in which they had no ownership, and shifted the fee simple from the heir to the purchaser.

The Ct. of Chancery, also, in permitting the devise of the *use* of lands, allowed the creation of executory interests by will. By the St. Uses, wills of uses were abolished until restored by the St. Wills. The uses had then become legal estates, but, following the old rule, future estates at law were allowed to be created by will, and were given the attribute of indestructibility. These future estates were called **executory devises.** Thus, A. devises land to his son A., an infant, but if A. dies under twenty-one, to B. and his heirs. A. has a fee simple in possession subject to an executory interest in favour of B.; if A. dies before twenty-one, nothing can prevent the estate of B. from coming into possession. The same effect might be obtained by a conveyance to uses, but *not* by a direct conveyance.

See *White* v. *Summers*, 1908, 2 Ch. 256.

Difference between Contingent Remainder and Executory Devise.—Devise to A. for life, with remainder to the first son of B. who attains twenty-one. If A. survives the testator this is a contingent remainder, the limitation to the son of B. depending on the determination of the prior estate of freehold in A. If A. dies before the testator the will commences with the limitation to the son of B., which arises as soon as a son of B. attains twenty-one, and displaces the estate in fee simple, which descends to the heir-at-law of the testator. It is therefore an executory devise. Before 1877, if A. survived the testator, but died before any son of B. attained twenty-one, the limitation failed; now it does not.

S. 6.

By the R. P. A. 1845, all executory interests may be disposed of by deed. An executory interest given to an ascertained person and his heirs will devolve on his death like a contingent remainder limited in fee to an ascertained person.

Estates may also arise under **statutory powers,** *e.g.*, the powers given to a life tenant under the S. L. A. 1882, who may convey the whole legal fee simple in the settled land if comprised in the settlement, though he himself has merely an equitable estate for life. The estate limited by such a conveyance arises solely by virtue of the Act, and differs from the power to appoint a use taking effect under the St. Uses. Thus, if land is conveyed under a statutory power to A. and his heirs, to the use of B. and his heirs, B., not A., takes the fee simple at law.

Ante, p. 20.

CHAPTER XVIII.

OF REMOTENESS OF LIMITATION.

The rule against perpetuities requires every future estate limited to arise by way of shifting use or executory devise to be such as *must necessarily arise within the compass of existing lives and twenty-one years after*, allowing for gestation where some person entitled is a posthumous child. If no lives are fixed, then twenty-one years only is allowed.

Every executory interest which *might* in any event transgress these limits is void from its commencement, excepting only executory limitations in defeasance of or preceded by an estate tail. Thus, a gift by way of shifting use or executory devise to the first son of A., a bachelor, who shall attain twenty-four, is void for remoteness, for if A. died leaving a son a few months old, the estate of the son could not arise within twenty-one years after A.'s death.[1]

Executory limitations contained in instruments coming into operation after 1882 are governed also by the C. A. 1882, enacting that where a person is entitled to an estate of freehold, with an executory limitation over on failure of issue, the limitation shall become void as soon as any such issue shall attain twenty-one.

S. 10.

[1] In the case of an executory gift by *will*, the time is computed from the death of the testator. If, therefore, the gift were made by will and A. were to die before the testator, leaving a son, it would be valid.

Restriction on Accumulation.—By the **Thellusson Act** (39 & 40 *Geo. III. c.* 98) the accumulation of **income** is forbidden for any longer term than (i.) the life of the grantor or settlor, or (ii.) twenty-one years after his death, or (iii.) the minority of any person living or *en ventre sa mère* at the death of the grantor, &c., or (iv.) the minority of any person who under the settlement would, if of full age, be entitled to the income directed to be accumulated. But the Act does not extend to provisions for payment of debts or raising portions, or any directions touching produce of timber or wood, nor to trusts for expending income on repairs. Any direction to accumulate, which exceeds the period allowed, is valid up to the time allowed, but void for the excess. But if the direction exceeds the perpetuity rule it is void altogether. By the Accumulations Act of 1892 the accumulation of income for the purchase of land is allowed only for the fourth of the above periods.

See *Re Travis*, 1900, 2 Ch. 541.

Rules governing Contingent Remainders.—Every contingent remainder must be supported by a particular estate of freehold, and must therefore vest during or immediately on the termination of the particular estate. From the consequences of this rule the **Contingent Remainders Act, 1877,** saves every contingent remainder created after its date, which would have been valid if originally created as a shifting use or executory devise.

Ante, p. 66.

But for a limitation to be good as such, it must conform to the perpetuity rule. Thus, if land be granted to A., a bachelor, for life, and on his death to his first son who shall attain twenty-four, if A. die before any son of his attain twenty-four, the contingent remainder to A.'s son will fail by the common law rule. And it will not be saved by the Act of 1877, being outside the perpetuity rule.

Perpetuity in the Case of Contingent Remainders.—In this case the rule adopted was that an estate given to an unborn child for life cannot be followed by any estate to any child of such unborn person. And in 1889 it was settled that this is an independent rule of law, and that such a remainder would be void although expressly confined to such child of the unborn parent as should be born

Whitby v. *Mitchell*, 42 Ch. D. 494, 44 Ch. D. 85.

See *Foran* v. *Bruce*, 1914, 1 Ch. 595.

within the compass of lives existing at the time of the gift.

Cy-près Doctrine.—In case, however, of a gift by will to the unborn son of some living person for his life, and after the decease of such unborn person to *his* sons in tail, the Court will carry out the intention of the testator by giving such son an estate in tail. This doctrine is applied only where the estates given to the unborn child are estates in tail.

In 1889, however, it was further established that a contingent remainder limited to take effect after a contingent remainder[1] is void unless it must vest within the time allowed by the perpetuity rule. This, however, does not apply to a contingent remainder limited to take effect on the termination of an estate tail originally limited as a contingent remainder.

Re Frost, 42 Ch. D.; cf. also *Re Ashforth*, 1905, 1 Ch. 535.

Contingent remainders of trust estates are governed by the perpetuity rule. Thus, if land be conveyed unto and to the use of trustees and their heirs on trust for A. for life, and after his decease for such son of A. as shall attain twenty-four, the limitation to the son of A. is void. Contingent remainders of equitable estates are also subject to the rule preventing the limitation of an estate in remainder, after a life estate to an unborn person, to his unborn child to be born or ascertained within the period allowed by the perpetuity rule.

See *Re Nash*, 1910, 1 Ch. 1.

For the purpose of the perpetuity rule the vesting of estates arising under general powers is calculated from the appointment, but in case of those arising under special powers from the date of the instrument creating the power, and any appointment will be valid, which, *having regard to the facts that have happened at the time of the exercise of the power*, confers on the appointee an interest which must vest within the life of a person living when the power was created, or within twenty-one years afterwards. But if the interest would have been too remote when inserted in the instru-

See *Whitby* v. *Von Leudeske*, 1906, 1 Ch. 783; *Re Thompson*, 1906, 2 Ch. 199.

[1] *E.g.*, a limitation of land to A., a bachelor, for life, and after his death to his first son for life, and after the son's death to A.'s eldest daughter, who shall *then* be living.

ment creating the power, it will be too remote when created in exercise of the power.

S. 13. By the J. A. 1838, judgments were made a charge on
S. 2. reversions and remainders, and the L. C. A. 1900, now applies to them. Contingent or executory interests vest in a trustee in bankruptcy, and are liable for the owner's debt after his death.

CHAPTER XIX.

OF HEREDITAMENTS PURELY INCORPOREAL.

PURELY incorporeal hereditaments are (1) **appendant** and (2) **appurtenant** to corporeal hereditaments—both of which pass by the conveyance of the corporeal hereditament; (3) in **gross** which require a deed for their transfer.

Class 1 includes—

(i.) A **seignory,** *i.e.*, the lordship (without any *reversion*), which remained in the lord of a manor, who granted part of the lands in fee simple: To this seignory the rent and fealty due from the tenant were incident, the land being holden of the manor. The Statute of Quia Emptores left untouched any existing tenancies in fee simple, and where lands are so held the seignory is an appendage to the manor and passes under a conveyance of it.

Ante, p. 6.

(ii.) **Rights of common,** as common of *turbary*, common of *piscary*, and common of *pasture*, *e.g.*, the right of free tenants of a manor to pasture their cattle on the waste lands, or to take turf, &c. therefrom.

See *Robertson* v. *Hartopp*, 43 Ch. D. 484.

(iii.) **Advowsons appendant to a manor.**

Post, p. 80.

Strips of waste at the side of a road, and the soil of the highway to the middle of the road, presumptively belong to the owner of the adjacent land on either side, and pass therewith.[1] The same applies to the soil of a river, except a tidal river, in which the soil to high water mark belongs

[1] *Belmore* v. *Kent County Council*, 1901, 1 Ch. 873; *Offin* v. *Rochford Rural Council*, 1906, 1 Ch. 342.

to the Crown.[1] The Crown is also presumptively entitled to the soil of the seashore to high water mark.[2]

Class 2 includes incorporeal hereditaments not naturally appendant to corporeal hereditaments, but annexed to them by express grant or prescription, *e.g.*, rights of way. Where so annexed they pass at C. L. by conveyance of the corporeal hereditaments. If not strictly appurtenant to the lands, though enjoyed therewith, they did not so pass without express mention; but now, by the C. A. 1881, a conveyance of land includes all commons, ways, easements and rights, reputed to appertain to the land or enjoyed therewith. S. 6.

Class 3 includes—

(i.) A **seignory in gross,** one severed from the demesne lands of the manor to which it was formerly appurtenant.

(ii.) A **rent seck,** a rent for which no distress could be made. This might arise where a landlord granted away his rent service independently of the seignory or reversion to which it was incident, or where a *rent-charge* was made without a clause of distress. But by 4 *Geo. II. c.* 28, *s.* 5, a remedy by distress was given for rent seck. Apart from distress, however, a grantee who had received any part of the rent had a real action against the tenant, and when such real actions were abolished he was allowed to sue the tenant personally.

(iii.) A **rent-charge.**—This arises on a grant by A. to B. of an annual sum of money payable out of lands in which A. has any estate, with power to distrain. A rent-charge cannot continue longer than the estate of the grantor, but if he be seised in fee simple may be of any estate, *e.g.*, for a term of years or in fee simple. It can be created or transferred only by deed or will. Annuities or rent-charges for life granted otherwise than by marriage settlement or will require registration under the J. A. 1855, in order to affect any lands as against a purchaser or mortgagee without notice thereof.

By the L. C. A. 1888, rent-charges created after the Act S. 12

[1] *Gann* v. *Free Fishers of Whitstable*, 11 H. L. C. 192.

[2] See *Brinckman* v. *Matley*, 1904, 2 Ch. 313.

under the Improvement of Land Act, 1864, are also void against a purchaser for value unless registered.

Rent-charges in settlements are usually created under ss. 4 and 5 of the St. Uses, which applied to *uses* of rent-charges the same rule as to uses of estates. If, therefore, land is conveyed to A. and his heirs to the use that B. and his heirs may receive a rent-charge in trust for C. and his heirs, the Statute vests the legal estate in B.; but he is merely a trustee for C., who has the equitable estate in fee simple in the rent-charge.

In granting a rent-charge it was necessary to give the grantee an express power of distress or the rent was merely a rent seck. It was also usual to give the grantee a power to enter on non-payment of rent, and to receive the rents and profits until all arrears and expenses were paid.

Now by the **C. A. 1881, s. 44,** any person entitled to a rent-charge or annual sum—not being rent incident to a reversion—charged upon land by any instrument coming into operation after 1881 has—unless a contrary intention is expressed in the instrument—a power (1) of distress if the rent or any part is unpaid for twenty-one days; (2) if unpaid for forty days to enter and take the income until arrears are paid; and (3) whether possession be taken or not to demise all or part of the land to a trustee for a term of years on trust to raise all arrears and expenses. By the C. A. 1911, s. 6, these powers are made exercisable where the annual sum is created under a *power* contained in an instrument coming into operation before or after the commencement of the Act of 1881, unless such instrument otherwise directs. The same Act declares that the *perpetuity rule* does not apply to any powers or remedies created by the C. A. 1881 or by any instrument for recovering or compelling the payment of any annual sum within s. 44.

S 3. By the Improvement of Land Act, 1899, rent-charges created under the Improvement of Land Act, 1864, are recoverable only in the above methods, and not by personal action.

Estates *pur autre vie* in rent-charges and other incorporeal

hereditaments are subject to the W. A. 1837, and the L. T. A. 1897.

Ante, Chaps. X., XI.

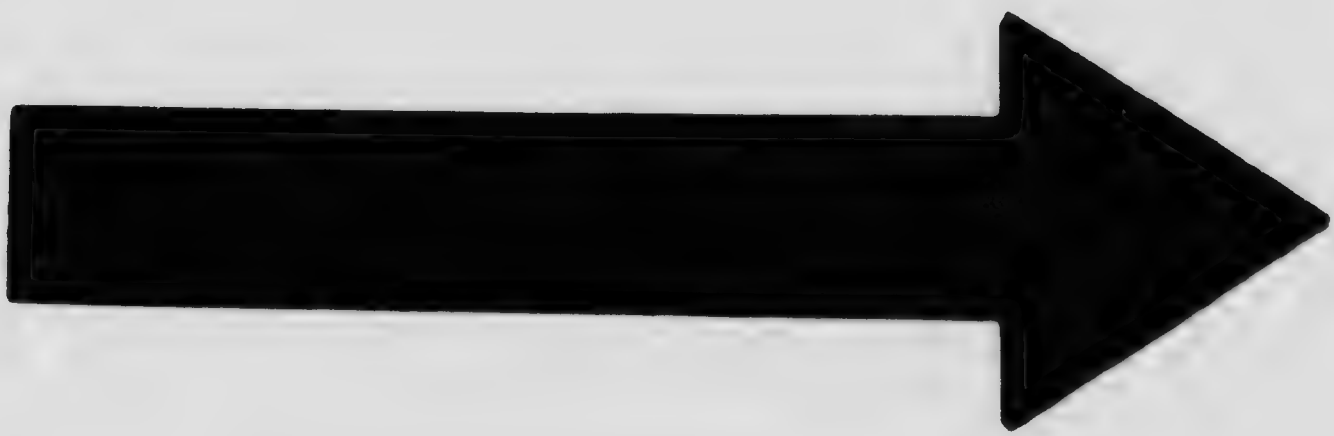
An estate *in fee simple* in lands is often disposed of for building purposes in consideration of a *rent-charge in fee simple* by way of ground rent. A conveyance is made to the purchaser and his heirs to the *use* that the vendor and his heirs may receive a certain rent-charge, and subject thereto to the use of the purchaser, his heirs and assigns for ever. The purchaser thus acquires an estate in fee simple, subject to a perpetual rent-charge.

A rent-charge was formerly indivisible, and a release of part of the land from the charge was a release of the whole. But by 22 & 23 *Vict. c.* 35, a release is limited to the part actually released. The Board of Agriculture also now has a power to apportion rents of every kind on the application of any person interested in the land or rent. S. 10.

Such rent-charges are usually further secured by a covenant for payment by the purchaser, which is, however, a *personal* covenant only enforceable against the purchaser or his representatives, and not against his assigns. But the rent-charge may be recovered by action against the actual tenant for the time being, whether the purchaser, his heir or his assign.

By the Bankruptcy Act, 1883, a trustee in bankruptcy may *disclaim* any property of the bankrupt which consists of land burdened with onerous covenants, and the Ct. may make an order vesting such property in any person entitled thereto. S. 55.

Incorporeal hereditaments are in general subject to the same rules as corporeal; they may be held for the same estates, and are alienable and devolve in the same way. In one respect they differ. Land is the subject of tenure, and rent service is an incident of the estate to which it belongs. But an estate in a rent-charge is incident to nothing; it cannot be subject to any tenure, nor originally could there be any escheat on the death of the owner. Now, by the Intestates Estates' Act, 1884, the law of escheat applies to legal and equitable estates in incorporeal hereditaments, just as to legal estates in corporeal hereditaments.



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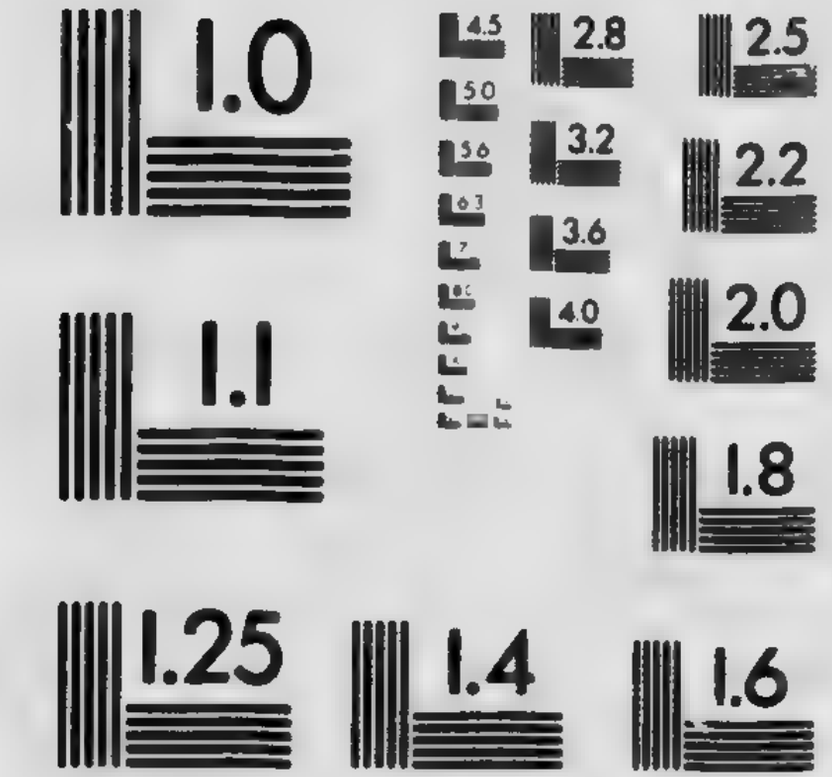

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(iv.) A **Right of Common in Gross.**—A right of common possessed by a person as an independent subject of property, and not as appendant or appurtenant to any lands of his own.

(v.) An **Advowson in Gross.**—An advowson is a perpetual right of presentation to an ecclesiastical benefice. The owner thereof is the patron of the benefice, and exercises his right by a *presentation* to the bishop of some qualified nominee whom the bishop is bound to *institute* to the benefice and cause to be *inducted* into it.

When the advowson belongs to the bishop it is *collative*. In some cases of advowsons *donative* the patron's deed of donation was sufficient, but by the Benefices Act, 1898, all such advowsons were made presentative.

Advowsons are (i.) of **rectories** which were originally appendant to some manor and part of the manorial property of the lord who endowed the church. Advowsons in gross arose chiefly on the severance of advowsons appendant from the manors to which they belonged. Any advowson may now be severed from the manor, and then becomes an independent incorporeal hereditament. While appendant it passes by a conveyance of the manor; if severed it requires a deed of grant. (ii.) Of **vicarages.** Advowsons were often granted to spiritual corporations, who became patrons thereof, but left the duties to be performed by a priest as their *vicar*. Hence arose vicarages, the advowsons of which at first belonged to the owners of the rectories as appendant thereto, but have in many cases become advowsons in gross.

The sale of an advowson does not include the right to the *next presentation* unless made when the church is *full*. The sale of a present right to present would be **simony**. But formerly, before a vacancy actually occurred, the next presentation might be sold, and when so sold was personal property. The advowson itself devolves like a fee simple estate, subject to the L. T. A. 1897. Now by the **Benefices Act, 1898,** any sale or grant of the next presentation, or anything less than the whole advowson, is void, though in a family settlement a life interest may be reserved to the settlor.

S. 1.

(vi.) **Tithes** were the exclusive property of the Church until the dissolution of monasteries by Henry VIII., when grants of their property, with tithes, were made to laymen. And as the grants were made to the grantees and their heirs, or heirs of their bodies, tithes became hereditaments in which estates might be held, and by 32 Hen. VIII. it was directed that they should be transferred by the same assurances as corporeal hereditaments. So, also, they descend in the same way, but are not affected by any custom; nor is there any merger if tithes and land are owned by the same person, nor will they pass on a conveyance of the land unless expressly mentioned.

Under the Commutation of Tithes Acts, a rent-charge has been substituted for tithes in kind, and provision is made for the merger of tithes or the rent-charge in the land.

By the Tithes Act, 1891, tithe rent-charge is recoverable only by an order of the County Court of the district where the lands are situate, enforceable by distress and entry if the lands are occupied by the owner, otherwise by the appointment of a receiver. Only two years' arrears can be recovered, and no one is personally liable for the payment thereof. Tithe rent-charges devolve like other realty. Ss. 2, 9.

CHAPTER XX.

COPYHOLDS.

Copyholds are lands holden by *copy* of Court roll, *i.e.*, the roll in which a record is kept of all the proceedings in the Court of the manor to which the lands belong. Copyhold tenure grew out of villenage. At the Conquest the *villanus* was personally free, but later the condition of the peasantry became depressed; and by the 13th century a clear distinction had arisen between socage, which had become freehold, and the tenure of the ordinary *villanus*, whose services were held to be servile. *Ante*, p. 6

As a result, the *villanus* became personally unfree; a free man might, however, hold land by villein *tenure*, and hence the word *villanus* was used to denote either a tenant in villenage, whether bond or free, or one who was in personal condition a bondman; later still it was confined to the latter meaning.

In the 13th century villenage was (1) *pure*, where the services were uncertain and unlimited; (2) privileged, where, though still servile, they were fixed by agreement. Tenant in villenage held in the name and at the will of his lord who was seised of the land; if ejected by his lord, he had in (1) no legal rights against him, in (2) his agreement gave him a right to sue his lord personally.

Villein *socage* was the tenure of lands of manors in the ancient demesne of the Crown by fixed and servile services. Such tenants were personally free, and could not be ejected while they performed their services, but their possession was not protected in the King's Ct. nor could they alienate their holdings.

Growth of Copyhold.—The will of the lord was largely controlled by custom, and the maintenance of customary rights was preserved in the manorial Court, of which all the villagers, bond and free, were judges, and in which the possession of a *villanus* was protected against everyone but his lord. As customs developed into rights, and personal bondage died out—owing largely to the commutation of labour services for money rents—villenage developed into copyhold. *Sub* Edw. IV. Littleton describes the tenant by copy of Court roll as holding lands in fee simple, fee tail, or for life, at the will of the lord, according to the custom of the manor, in virtue of an immemorial custom within the manor. By this time the Court held for customary tenants was distinct from the Court Baron, the lord only or his steward being judge of the Customary Court. Gradually the interests of copyholders developed into customary *estates*, secured by rights which could be enforced in the King's Courts instead of by custom. Under Hen. VI. it was said that a tenant by copy of Court roll should have a remedy in Chancery against his lord who

dispossessed him; and under Edw. IV. his rights against his lord were, to some extent, recognized at law, but they were not finally secured until Elizabeth, when it was decided that a copyholder might recover possession from his lord as well as from a stranger in an action of ejectment which he could bring at C. L.

Of Estates in Copyhold.

Strictly, a copyholder remains a tenant at will. The seisin and feudal possession remain in the lord who has the legal estate in fee simple controlled only by the custom of the manor. The lord also has the right to all mines and minerals, and timber, though, subject to any special custom of the manor, he cannot come upon the lands to open mines or cut timber without leave of the copyholder. Again, if a tenant, without his lord's consent, granted a lease of his lands beyond a year, it would be a cause of forfeiture unless permitted by special custom. So also a copyholder may not commit *waste*, either voluntary or permissive; he has merely a customary right to occupation, and if he exceeds this right it is a cause of forfeiture.

The same incidents belong in general to **customary freeholds**, a tenure by copy of Court roll but not held at the will of the lord. Such customary tenants not having the freehold are successors of tenants in pure villenage on manors of ancient demesne.

While the copyholder with regard to the lord is strictly a tenant at will, he stands, when admitted, with respect to other copyholders in a similar position to a freeholder who has the seisin. The legal estate is in him, and he may hold customary estates analogous to those in freeholds, *e.g.*, in fee simple, in tail, or for life.

On every change of tenancy by death or alienation, and occasionally on change of the lord, a *fine* is payable to the lord. Such fines are now in general restricted to two years' improved value of the land, deducting quit rents. Free power of alienation appertains to an estate in fee simple in copyholds.

Estates Tail in Copyholds.—The St. *De Donis* did not *Ante*, p. 14.

apply to copyholds. Where an estate was given to a copyholder and the heirs of his body, then (i.) if there was in the manor no custom to entail, the donee took an estate analogous to the fee simple conditional at C. L., (ii.) if there was a custom to entail, the estate was originally inalienable, but later might be barred according to the custom of the manor by a customary *recovery*, or by forfeiture and regrant, or by surrender.

Ss. 50—52. Now, under the Fines and Recoveries Act, 1833, a customary estate in fee tail is barred by conveyance by surrender. Where the estate tail is in remainder, the consent of the *protector* may be given either by deed or by his concurrence in the surrender.

Estates pur autre vie in Copyholds, in case of the death of the grantee during the life of the *c. q. v.*, formerly passed to the lord during the residue of the life of the *c. q. v.*, and no one could hold them as *general occupant*, but now they are governed by the W. A. 1837.

Ante, p. 22.

Copyholds are now subject to the debts of the tenant during his life in the same way as freeholds and are governed by the same statutes; they will also vest in his trustee in bankruptcy who need not be admitted but may deal with them as if they had been surrendered to such uses as he might appoint, and any appointee of his must be admitted accordingly.

Legal estates in copyhold or customary freehold are not, either in respect of liability for the debts, &c. of a deceased tenant or in respect of their devolution, affected by the L. T. A. 1897. Subject to any special custom they devolve according to the Inheritance Act, 1833; the heir is not, however, tenant as against the lord until he has been admitted.

Fealty and suit of Court are due from a copyholder, and the lands will escheat to the lord on failure of heirs. When a copyholder in fee aliens the land in tail or for life, the alienee does not hold of him as in the case of freehold but of the lord.

Heriots.—Before the Conquest it was the custom for the freeholder to furnish his tenant in villenage with oxen, a

cow, sheep, and implements of husbandry. These reverted to the freeholder on the tenant's death, and were usually transferred to the new tenant. In time it became customary that the tenant's heir should succeed him, and that the landlord should take into his own hands, not the whole stock, but only the best beast or other chattel, called a heriot, after the analogy of the heriot proper, which was a tribute of war horses, weapons and armour due to the King on the death of an eorl or thegn. The right of the lord is now limited to such a chattel as the custom of the manor permits him to take, and in some cases merely to a money payment.

All kinds of estates in copyhold may be held in joint tenancy or tenancy in common, and in the former case the admittance of one is the admittance of all. By the Copyhold Act, 1841, the Ct. of Chancery was given jurisdiction to compel partition of copyhold.

Enfranchisement is the conversion of a copyhold estate into an estate of freehold. At C. L. it could be effected only by agreement between the lord and the tenant, the terms thereof being matter of agreement between them. But by the **Copyhold Act, 1894,** provisions are made both for *voluntary* and *compulsory* enfranchisement, the latter at the instance of either lord or tenant. If the parties cannot agree, the compensation is settled by valuation, and may take the form of a rent-charge to issue out of the enfranchised land. Enfranchisement under the Act makes the land to be of freehold tenure, but does not, apart from express agreement, affect the lord's rights to minerals or escheat or the tenant's rights of common.

By the S. L. A. 1882, a tenant for life of a manor has power to enfranchise. Ss. 3, 20.

CHAPTER XXI.

OF THE ALIENATION OF COPYHOLDS.

ALIENATION is by **surrender** into the hands of the lord and **admittance** by him of the ·nee. Formerly this must take place in the Customar ·f the manor, to constitute which at least two copyhc ·s were necessary, or if made out of Court, *presentment* of the transaction must be made by the *homage* (*i.e.*, the copyholders present) at a subsequent Ct.

By the Copyhold Acts of 1841 and 1894, Customary Cts. may be held without the presence of an· ·pyholder; presentment by the homage is also rendered unnecessary, and a simple entry of a surrender on the Ct. rolls suffices.

The surrender is made to the lord to the use of the alienee for any estate which it may be wished to convey; if made in Ct. it is entered on the Court rolls, a copy of which is given to the purchaser as a muniment of his title; if made out of Ct. a memorandum in writing is signed and entered on the Ct. rolls.

A surrender might always be made by a man to the use of his wife. Lands of a married woman might be surrendered by her husband and herself after her separate examination. By the Vendor and Purchaser Act, 1874, it was provided that where a married woman was a bare trustee[1] of copyhold she might surrender it as if she were a *feme sole*. If it is her separate property under the M. W. P. A. 1882, she may surrender it as a *feme sole*.

Replaced by Trustee Act, 1893, s. 16.

Ante, p. 13.

On surrender, the surrenderor continues tenant to the lord until the admittance of the surrenderee, who has a right to procure admittance, and then becomes at once tenant to the lord and is bound to pay the customary fine. The admittance relates back to the surrender, and would displace the previous admittance of a subsequent

[1] *I.e.*, a trustee with no other duty than to convey the estate at the direction of the *c. q. t.*

surrenderee. Admittance must formerly be within a manor, but by the Copyhold Act, 1894, may be made by the lord or the steward out of the manor without holding a Court. S. 84.

Alienation by will was formerly effected by a surrender to the use of the will. The will formed part of the surrender, and no particular form was necessary. By 55 *Geo. III. c.* 192, a devise was rendered valid without any previous surrender to the use of the will. By the **W. A. 1837,** a will of copyholds must be executed in the same way as one of freeholds. Formerly the devisee, before admittance, was required to make a *presentment* of the will at the next Customary Ct. after the death. Now the mere delivery of a copy of the will to the lord or steward is sufficient to authorize its entry on the Ct. rolls, and the devisee may be admitted at once.

If, on the death of a tenant, no one claims as heir or devisee, the lord, after making proclamations at three successive Courts, is entitled to seize the lands *quousque*, *i.e.*, until some person claims admittance, or in some cases to seize it absolutely. Special provisions have been made by statute for protecting infants, married women and lunatics entitled to admittance.

The **St. Uses** has *no application to copyholds.* A person [illegible] by surrender of copyhold to his *use*, obtain the [illegible] which remains always in the lord. But where a surrender is made to the *use* of any person, the lord is merely an instrument for effecting the alienation, and his title is immaterial. If, however, a surrender be made for one person to the use of another on trust for a third, the surrenderee would be compelled to perform the trust as in case of freehold. This method is adopted in settlements of copyhold estates in which equitable estates may be created, as in freeholds.

An equitable estate tail in copyholds may be barred by deed in the same manner as freehold, the deed being entered on the Court rolls of the manor.

On death of a sole trustee of copyholds who has been admitted, his estate does not devolve on his personal representatives like freehold, but on his customary heir.

Re Somerville and Turner, 1903, 2 Ch. 583.

Equitable estates in copyhold are subject to the L. T. A. 1897.

The owner of an equitable estate in copyholds not being tenant to the lord cannot make a surrender except that (i.) a tenant of an equitable estate tail may bar the entail by surrender as well as by deed; (ii.) a husband and wife may surrender the wife's equitable estates after her separate examination in the same way as if her estate was legal, as well as by deed acknowledged under the Fines and Recoveries Act, which need not be entered on the Court rolls.

If the equitable estate belong to the wife for her separate use, or as her statutory separate property, she may dispose of it as a *feme sole*.

If copyholds fall into the hands of the lord he may regrant them as copyhold, but if he once make any conveyance at C. L., his power to grant by copy is for ever destroyed.

Remainders may be created of copyhold as of freehold, and unless there is a special custom to the contrary the admission of the life tenant is the admission of all remaindermen. A vested estate in remainder may be conveyed by surrender and admittance. Contingent remainders were not liable to destruction by the premature determination of the particular estate being preserved by the freehold vested in the lord. But if not ready to come into possession when the particular estate expires regularly they will fail, unless protected by the Contingent Remainders Act, 1877.

Executory devises of copyholds have long been permitted as of freeholds. When directions are given to executors to sell copyholds of their testator, the executors need not be admitted, the purchaser from them alone requiring admittance.

Husband and Wife.—A husband possessed the same rights over his wife's copyholds as her freeholds. But by the M. W. P. A. 1870, rents and profits of copyhold or customary freehold descending on a woman married after the Act as heiress of an intestate were made her separate property. And by the Act of 1882 a married woman

Ante, p. 57

holds any copyhold which is her separate property under the Act, and the rents and profits thereof, as a *feme sole*.

A special custom is required to entitle a husband to curtesy of or to give a wife any interest after her husband's death in copyholds. In the latter case such interest is termed **freebench,** and is usually a life interest in one divided third and is paramount to debts. It does not usually attach until the death of the husband, and may be defeated by a devise of the lands. It is not governed by the Dower Act, 1894.

CHAPTER XXII.

OF A TERM OF YEARS.

Terms of years are (i.) those created by ordinary leases subject to a yearly rent; (ii) long terms created under settlements, wills or mortgages, in which no rent is usually reserved, and the object of which is to secure the payment of money by the owner of the land. All terms of years of whatever length possess the same attributes.

A **tenancy at will** may be created by parol or deed. The lessee may be turned out at his landlord's pleasure, or leave at his own; he is not answerable for permissive waste, and has a right to emblements. A lease at an annual rent made generally without expressly stating it to be at will, and without limiting any certain period, is not a lease at will but from year to year.

A **tenancy at sufferance** is where a person who came into possession by a lawful title holds on after its determination.

In a **lease from year to year** both landlord and tenant are entitled to *notice*. This, at C. L., must be given at least half a year before the expiration of the current year, except in cases under the Agricultural Holdings Act, 1908, in which a year's notice expiring with a year of tenancy is necessary, unless by contrary agreement in

S. 22.

writing, except where the tenant is bankrupt or has compounded with his creditors. Under this Act a landlord may give a tenant notice to quit part of the land in order to effect certain specified improvements, but the tenant may by notice in writing accept the same as notice to quit the whole. The parties to any lease from year to year may, however, make an agreement for any notice, *e.g.*, three months to be given on any day.

S. 22.

A lease of a separate *incorporeal* hereditament always required a deed, and by the **R. P. A. 1845,** a lease required by law, *e.g.*, by the St. Frauds, to be in writing, of any tenements or hereditaments is void *at law* unless made by deed. But such a lease may be valid as an agreement to grant a lease, and since the Judicature Acts a tenant under an agreement for a lease *which he might enforce specifically in equity*, is to be treated as if he were tenant at law upon the terms of the agreement, and is practically in the same position as if he had a lease by deed.

S. 3.

Ante, p. 36.

See *Walsh* v. *Lonsdale*, 21 Ch. D. 9; *Swain* v. *Ayres*, 21 Q. B. D. 209.

No formal words are necessary to make a lease for years. There is no limit to the number of years for which it may be granted, but it must have a time fixed at which it is to begin—which may be a future time—and a time fixed for its ending, so as to make it a *term* as distinct from a freehold.

Leases of land in Middlesex and Yorkshire, with certain exceptions, require *registration* in the same manner as conveyances of freeholds. Leases for forty years or more in districts where registration is compulsory on sale do not pass any legal estate to the transferee until he is registered. This does not, however, apply to terms created for mortgages nor where the lessees are trustees of a settlement for the purpose of the Settled Land Acts, provided, in the latter case, that the life tenant is registered.

Before **entry** the lessee has in general no estate but merely an *interesse termini*, or right to the term. But where the lease is made by any conveyance under the St. Uses, the term vests in the lessee at once without entry, and registration under the Land Transfer Acts has the same effect.

Lease by Estoppel.—If A. by deed leases to B. lands in which he has no interest, both A. and B. are during the term *estopped* from denying its validity. If, then, A. at any time during the lease acquire such lands, the lease takes effect out of his estate and becomes a regular estate for a term of years. But if A. had *any* interest in the land only such interest passes, and the lease will have no further effect by estoppel.

A tenant for a term of years has a true property in his holding, and has the right to possession against everyone. He may dispose of his interest by *assignment* of the whole, or by granting an *underlease* for a shorter term than his own, unless his lease has contained a covenant not to assign or underlet.

He is, in the absence of agreement, liable for voluntary waste, and in respect of permissive waste is bound to keep the premises wind and water tight. His rights are, however, usually regulated by express covenants, *e.g.*, as to repair, painting, mode of cultivation[1] and use of premises.

Under an agreement to take a lease with "usual" **covenants,** the lessor cannot insist on more than covenants (i.) to pay rents; (ii.) to pay taxes, except those expressly payable by the lessor; (iii.) to keep and deliver up in repair; (iv.) to allow lessor to enter and view repairs. And the lessor is entitled to have a condition for re-entry on non-payment of rent, but not on breach of other covenants. And the lessor is only bound to enter into the usual qualified covenant for quiet enjoyment.

See *Re Lander and Bagley*, 1903, 3 Ch. 41.

As a matter of contract, the covenants of the lessor and of the lessee remain binding on them for the whole term, in spite of any assignment; hence, on a sale by the lessee, the purchaser is bound to covenant to indemnify him against any breach of covenant. Even without such a covenant an assignee must indemnify the lessee for any breach of covenant while he remains entitled to possession, but on assignment his liability passes to his assignee.

See *Stuart* v. *Joy*, 1904, 1 K. B. 362.

See *Moule* v. *Garrett*, L. R. 7 Ex. 101.

[1] The effect of such covenants is now, however, restricted by the Agricultural Holdings Act, 1908, s. 26.

Any assignee is liable to the *landlord* for the rent, and for breach of *covenants running with the land*[1] while the term is vested in him. Such covenants are (1) covenants relating to the premises let; (2) covenants to do any act on the premises, provided the lessee covenanted for himself and his assigns. But *not* covenants to do any act on premises not included in the lease. So also the benefit of covenants relating to the land entered into by the lessor will pass to the assignee by virtue of his *privity of estate* with the lessor. This right was confirmed by 32 *Hen. VIII. c.* 34, which also enabled the assignee of a *reversion* to take advantage of covenants entered into by the lessee. And by the C. A. 1881—in leases after 1881—the rent and the benefit of the lessee's covenants having reference to the subject-matter of the lease are annexed to, and the obligations of the lessor's covenants are imposed on, the immediate reversionary estate, and may be apportioned in case of severance.

Ss. 10 and 11.

Ante, p. 61.

Re-entry on breach of covenant, *other than the covenant to pay rent*, is now governed by the **C. A. 1881.** By this Act a right of re-entry or forfeiture is not enforceable unless the lessor has served on the lessee a notice specifying the breach, and requiring it to be remedied if capable of remedy, and compensation to be made, and the lessee has failed to comply with the notice. And where a lessor is proceeding to enforce his right of re-entry, *but not after he has actually recovered*, the Ct. may grant relief against such forfeiture.

S. 14.

See *Rogers* v. *Rice*, 1892, 2 Ch. 270.

These provisions did not extend to (i.) covenants against assigning, underletting, &c., nor (ii.) to certain covenants in mining leases, nor (iii.) to a condition for forfeiture on the lessee's bankruptcy, or the taking in execution of his interest. But as to (iii.), it is provided by the C. A. 1892, that such a condition is only to be excepted from the operation of these provisions after one year from the date

S. 2.

[1] See *Thomas* v. *Hayward*, L. R. 4 Ex. 311; *Clegg* v. *Hands*, 44 Ch. D. 503; *White* v. *Southend Hotel Co.*, 1897, 1 Ch. 767; *Dewar* v. *Goodman*, 1908, 1 K. B. 94, 1909, A. C. 72; *Ricketts* v. *Enfield Churchwardens*, 1909, 1 Ch. 545.

of the bankruptcy, &c., and provided the lessee's interest be not sold within the year. See *Horsey Estate, Ltd.* v. *Steiger*, 1899, 2 Q. B. 79.

A right of entry was at C. L. indivisible, and was destroyed by the lessor giving the lessee any licence to commit any breach of covenant, or by his waiver of the right after breach. But by *Lord St. Leonards' Act*, 1859, it was provided that a licence should extend only to the particular act licensed, and by an amending Act of 1860 that a waiver should apply to the particular breach waived.

For the same reason, the grantee of part of a reversion could not at C. L. take advantage of a condition of re-entry. A remedy was provided for this by Ld. St. Leonards' Act, as far as concerns covenants for payment of rent; and now the **C. A. 1881,** provides that every right of re-entry and condition contained in leases made after 1881 shall, on severance of the reversionary estate, become annexed to the several parts thereof. S. 12.

By the St. Frauds, writing was required to *assign* a lease; now, by the R. P. A. 1845, an assignment of any chattel interest, not being copyhold, in any land or hereditament must be by deed. Assignments of leases require registration to the same extent as the leases themselves. S. 3.

Leaseholds, being chattels, could always be disposed of by *will*, and devolved on the executors or administrators like other personalty.

By the **W. A. 1837,** a general devise of the *land* of the testator, and any general devise which would describe leasehold if the testator had no freehold which could be described by it, will include leaseholds, unless a contrary intention appears by the will. S. 26.

Leaseholds could always be taken in execution for debt in the lifetime of the debtor, or made liable after his death, like his other chattels. The effect of a judgment as a *charge* on leaseholds is now governed by the L. C. A. 1900. On bankruptcy they vest in the trustee, subject to his right of disclaimer. Part ii., Chap. VII.

An **underlease** is any grant for less than the whole term. Any assurance of the whole is an **assignment.** *Lewis* v. *Baker*, 1905, 1 Ch. 46.

An underlessee is tenant to his immediate, and not the

original, lessor. Between the latter and an underlessee no privity exists, either of contract or estate, since the estate of the underlessee is a new and distinct term. He cannot, therefore, sue the underlessee for any breach of the covenants of the original lease.

But see *Patman* v. *Hailand*, 17 Ch. D. 353.

Goods of an under-tenant—unless he is a mere lodger—were liable at C. L. to distress for the rent due under the head lease [1]; he may also be ejected by the superior landlord if the head lease be determined by re-entry. But he is entitled to the same relief against forfeiture for non-payment of rent as the lessee; and by the **C. A. 1892,** where a lessor is *proceeding* to enforce any right of re-entry or forfeiture, the Ct. may, on the application of the underlessee, make an order vesting in him, on such conditions as it may think fit, the property comprised in the lease for the whole or any less term. Under this Act an under-tenant may be relieved where the lessee would be without remedy under the Act of 1881—*e.g.*, on breach of a covenant not to assign, or to pay rent.[2]

S. 4.

Underleases and assignments thereof require registration in Middlesex and Yorkshire to the same extent as leases and assignments of leases from a freeholder, and are governed in the same way by the L. T. A. 1897.

A husband might at C. L. dispose of his wife's term of years during the coverture, and if he survived he took it *jure mariti*. But if he died first it survived to her, unaffected by his will. He had similar rights over the wife's *equitable* interest in a term of years, subject to her *equity to a settlement*. But if there were a trust for her separate use she could dispose of her interest as a *feme sole* as she can now, if it is her separate property, under the M. W. P. A. 1882. If, however, she makes no disposition thereof in her life or by her will, her husband becomes entitled thereto at her death *jure mariti*, without taking out letters of administration.

See *Sarman* v. *Wharton*, 1891, 1 Q. B. 491.

[1] See now, however, the Law of Distress Amendment Act, 1908, p. 61.

[2] *Wardens of Cholmeley School* v. *Sewell*, 1894, 2 Q. B. 906; *Gray* v. *Bonsall*, 1904, 1 K. B. 601.

Renewable Leases.—Sometimes fresh leases are granted before the expiration of existing leases; in others, there is a covenant to renew the lease on payment of a fine, and such a covenant may confer a perpetual right of renewal. The acceptance of a new lease operates as a surrender of the old; and if a new lease is granted to another person by the consent of the tenant who gives up possession, this is an implied surrender. If a trustee obtains a renewal of a lease he is a constructive trustee thereof for the *c. q. t.*

See *Wallis* v. *Hands*, 1893, 2 Ch. 75.

Improvements.—Before 1876 the tenant of an agricultural holding had no right to compensation for improvements, except by express agreement or under a local custom. Now, by the **Agricultural Holdings Act, 1908,** a tenant of a holding to which these Acts apply may obtain compensation (1) for the erection of buildings and specified permanent improvements if executed with the previous consent of the landlord or his tenant; (2) for drainage if he has given the landlord notice of his intention to execute such improvements; (3) for manuring and similar improvements though the landlord's consent has not been obtained. In this case fair compensation, payable under an agreement in writing, may be substituted for compensation under the Acts. Apart from this, an agreement depriving the tenant of his rights under the Act is void.

Ss. 1—9, and Schedule 1.

A landlord paying compensation may obtain from the Board of Agriculture an order charging the land with repayment of the amount with interest. Such a charge to be valid against a purchaser must be registered in the Land Registry Office.

S. 15.

S. 19.

Long Terms of Years.—In settlements, long terms are often created to secure payment of money (*e.g.*, of portions for younger children) without affecting the seisin of the freehold. The term—say of 1,000 years—is limited, by way of use, to trustees on trust out of the rents and profits, or by sale or mortgage thereof, to raise the money required and subject thereto on trust to permit the owners of the land to receive the rents and profits.

Usually in such case there is a **proviso for cesser,** *i.e.*, that

if the money is duly paid the term shall become extinguished.

It might also be extinguished by being surrendered by the trustees to any owner of the freehold. The smallest freehold is larger than the longest term; if, therefore, even a life tenant of the land became possessed of the term without any vested estate intervening, it would merge in his life estate, which would become no larger thereby. At law, though not in equity, merger would occur in spite of any trusts, *e.g.*, if the trustees purchased the freehold; but since the Judicature Act, 1873, no merger occurs in law where there was none in equity.

If the term was not extinguished by merger, or under a proviso for cesser, it might be kept on foot for the benefit of the owner for the time being. A purchaser of the freehold might have the term assigned to a trustee for him and his heirs and assigns, or, as it was said, *in trust to attend the inheritance*. He would thus gain protection against any incumbrance which, unknown to him, the vendor might have created upon the land since the term, and which could only take effect subject to the term. If, however, the purchaser at the time of purchase knew of the incumbrance, he could not defeat it in this way unless it was merely a right of dower which had attached to the lands. If a term were neither surrendered nor assigned to a trustee to attend the inheritance, it was still considered to be attendant on the inheritance for the benefit of all persons entitled to the inheritance.

S. 1. But by the **Satisfied Terms Act, 1845,** it was provided (i.) that every existing satisfied term attendant on any inheritance should, on December 31st, 1845, absolutely cease, but if attendant by express declaration it should continue to afford the same protection as if it still subS. 2. sisted; (ii.) that every term becoming satisfied after that date should, on becoming attendant on an inheritance, immediately cease and determine.

S. 65. By the **C. A. 1881,** where land is held for an unexpired residue of not less than 200 years of a term originally not less than 300 years, which was not liable to be determined

by re-entry on breach of condition, not subject to any right of redemption in favour of the reversioner, or to any rent of money value, and not created out of a term itself incapable of enlargement, it may be enlarged into a fee simple by a declaration by deed made by (i.) any person beneficially entitled thereto; (ii.) any person who is trustee thereof, or who has it vested in him on trust for sale; (iii.) any person in whom it is vested as personal representative.

CHAPTER XXIII.

OF A MORTGAGE OF LAND.

A MORTGAGE of land is the transfer of the property therein as security for the payment of money. In early law a pledge of land was effected by a conveyance to the creditor to hold until the debt was paid, either applying the profits and rents to payment thereof, or taking them in lieu of interest, the latter being termed a *mortuum vadium* (*mort gage*).

Later, the land was given in pledge, with a proviso that on non-payment it should remain to the creditor in fee. Then it became the custom to enfeoff the creditor in the first instance with a proviso for re-entry on payment. A mortgage therefore became a conveyance of land for an estate to be determined on repayment by a certain day. And at *law* if it was not so paid, the estate of the person to whom it was conveyed became absolute. But in *equity*, a mortgagor on paying all that was due was allowed to redeem his estate after the legal day of payment. This principle of the mortgagor's *equity of redemption* was completely settled *sub* Charles II., when it was laid down that a conveyance made as a security for money is always in equity a mortgage and redeemable in spite of any agreement to the contrary. Hence the phrase "once a mortgage always a mortgage."[1]

[1] See *Salt* v. *Marquis of Northampton*, 1892, A. C. 1; *Biggs* v. *Hoddinott*, 1898, 2 Ch. 307; *Noakes* v. *Rice*, 1902, 2 A. C. 24; *Reeve* v. *Lisle*, *ibid.*,

Further, it was held that in equity the right of the mortgagee was to the money secured, that he held the land only as a security, and had merely a charge on it, though at law he were absolute tenant in fee. Though at law the estate of a mortgagee in fee went to his heir or devisee, in equity it was considered personalty, and he was merely a trustee of it for the executor or administrator. Conversely, the mortgagor was in equity considered as the owner of the land subject to the mortgage, and his equity of redemption was treated as an equitable estate in the land. At the present day, on mortgage to secure a loan, the land is conveyed to the creditor with a proviso for reconveyance on payment of principal and interest at a specified date. There is also a personal covenant by the mortgagor for payment. Until the date specified the mortgagor has a legal right to redeem; afterwards he has merely an equity of redemption.

The **mortgagee** acquires the fee simple and seisin and an immediate right of entry, the mortgagor remaining in possession being strictly a tenant by sufferance. And the Cts. of Equity would never restrain a mortgagee from taking possession. But if he does take possession, he is liable in equity to account strictly for the rents and profits and his management; hence possession is taken only as a last resource. Under ss. 219 and 220 of the C. L. Procedure Act, 1852, where the mortgagee takes proceedings to obtain possession the mortgagor may stay the proceedings by payment of the debt, interest, and costs.

The **mortgagor** while in possession may take the rents and profits without any liability to account for them; he retains his right of free enjoyment, and is not liable for waste unless it is wanton destruction or impairs the value of the security. His equity of redemption is real estate in equity, and is alienable and devolves like other equitable estates.

Formerly, on death of a mortgagor of land the debt was primarily payable out of his personalty. Now, under **Locke King's Act, 1854,** and amending Acts, the heir or

17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34.

461; *Bradley* v. *Carritt*, 1903, A. C. 253; *Samuel* v. *Jarrah, &c., Corporation*, 1904, A. C. 461; *Kreglinger* v. *New Patagonia, &c., Ltd.*, 1914, A. C. 25.

devisee is not entitled to have the debt discharged out of the personalty, but the land itself is subject to it, unless the mortgagor by will, deed, or other document signifies a contrary intention. Nothing, however, prevents the *mortgagee* from obtaining payment out of the personalty of the mortgagor.

Power of Leasing.—The mortgagor's equity of redemption being an estate in equity only, does not in general enable him to create any legal interest in the land, except under an express power given to him by the mortgagee, and operating under the St. Uses. But under the **C. A. 1881,** a mortgagor in possession[1] has power to make an agricultural or occupation lease for not more than twenty-one years, and a building lease for not more than ninety-nine years, and under this statutory power the lessee gets a term in the land valid at law. These statutory powers may be enlarged or excluded by the mortgage deed. S. 18.

Actions.—At C. L. the mortgagor could bring no action to recover possession of the lands. But by the Judicature Act, 1873, a mortgagor entitled to possession or to the receipt of rents and profits may, with certain exceptions, sue in his own name for the recovery thereof, or to prevent or recover damages for any wrong relative thereto, provided that the mortgagee has given no notice of his intention to take possession or enter into receipt of the rents and profits. S. 25.

The **mortgagee's remedies** are: (1) In case of non-payment to sue the mortgagor personally on his covenant to repay. (2) To *foreclose*, *i.e.*, take proceedings in the Ch. D. for an account of principal and interest due, and that the mortgagor may be directed to pay with costs on a certain day, and in default may be foreclosed his equity of redemption. If payment is not made, an order for foreclosure follows, which vests in the mortgagee the full beneficial title in the land. The Court may now in foreclosure proceedings order sale instead of foreclosure. C. A. 1881, s. 25.

[1] And any person, other than an incumbrancer, deriving title under the mortgagor (C. A., 1911, s. 3). By this Act a mortgagor may accept surrenders of leases in order to grant any of the above leases.

(3) To take possession. (4) To sell under his power of sale, if he have one. On sale the surplus, after payment of debt, interest and costs, must be paid to the mortgagor.

S. 19, extended by C. A. 1911, s. 4. See also s. 5.

By the **C. A. 1881,** every mortgagee under a mortgage made *by deed* after 1881 has a power of sale. But he may not exercise it unless (1) notice requiring payment has been served on the mortgagor, and default has been made in payment of the mortgage money or part thereof for three months after service; **or** (2) some interest is two months in arrear; **or** (3) there has been a breach by the mortgagor of some provision contained in the mortgage deed or in the Act other than for payment of the debt or interest.

These provisions may be varied, extended, or excluded by the mortgage deed. By the same Act a mortgagee under a mortgage made by deed after 1881 may, when

Ss. 19, 23, 24.

his statutory power of sale becomes exercisable, appoint a receiver of the income, and may under certain conditions insure against fire and cut and sell timber. If in possession, he may also grant the same leases as a mortgagor in

S. 18.

possession, and they will be good against the mortgagor or prior incumbrances. By s. 3 of the C. A. 1911 the mortgagor is deprived of the statutory powers of leasing or accepting surrenders after the appointment of a receiver and so long as the receiver acts, during which time these powers are exercisable by the mortgagee.

Mortgagor's Remedies.—If he wish to pay off the mortgage after the day fixed he must, as a rule, give the mortgagee six months' notice, or pay six months' interest. He can then require a reconveyance, and to enforce this or his right of redemption he may take proceedings for redemption in the Ch. D. In such proceedings the Ct. may order a sale.

C. A. 1881, s. 25.

Lapse of Time.—(i.) If a mortgagee has obtained possession the mortgagor can only redeem within twelve years thereafter, or twelve years after any written acknowledgment of his title or right to redeem has been given

See *Sutton* v. *Sutton*, 22 Ch. D. 511, and Part ii., Chap. XIV.

signed by the mortgagee. (ii.) If the mortgagor remain in possession without paying principal or interest, or without giving any written and signed acknowledgment of the title

or right of the mortgagee, the latter will similarly be barred from taking possession, or foreclosing, or suing for his money, at the end of twelve years from the time when his right of entry or right of action accrued.

Copyholds.—The mortgage of copyholds is effected by a deed of covenant to surrender, followed by a surrender to the use of the mortgagee, subject to a condition that on payment on a fixed day the surrender shall be void. If not so paid the mortgagee has at law an absolute right to be admitted to the customary estate, surrendered to him, subject to the mortgagor's equity of redemption. If the mortgagee is admitted he must, on payment, surrender back to the use of the mortgagor. If he has not been admitted, a memorandum of his acknowledgment of satisfaction is inserted in the Ct. rolls.

By the Copyhold Act, 1894, the provisions of the C. A. 1881, as to the devolution of the estate of a sole mortgagee do not apply to copyhold or customary freehold where the mortgagee has been admitted. *Ante*, p. 41.

Leaseholds may be mortgaged (i.) by assignment, subject to proviso for re-assignment; (ii.) by sub-demise of a slightly shorter term, with a proviso for surrender on payment, and a declaration that the mortgagor shall hold his reversion on trust for the mortgagee, subject to his equity of redemption. In the first case the mortgagee *is*, in the second he *is not*, liable to the original landlord for payment of the rent and performance of the covenants of the original lease.

Equitable Mortgages arise (i.) on the mortgage of an equity of redemption or other equitable estate; (ii.) where a legal owner of lands pledges them by writing without deed, or deposits the title deeds with the mortgagee. When lands are sold, but the purchase-money is not paid, the *vendor* has a *lien* in equity on the lands for the amount unpaid, with interest at four per cent. The lien is not destroyed by taking a bond or note, but it is by taking a mortgage or independent security.

A stipulation in a mortgage that on failure of punctual payment the rate of interest shall be increased is void,

but a stipulation to diminish the interest on punctual payment is good.

Where money is advanced by several persons, it is in equity presumed to have been lent in equal shares, and on the death of one his share will pass to his executor or administrator. In a mortgage to trustees the trust is usually kept off the face of the mortgage deed, and to avoid the above rule it was usual to declare that the money was advanced by them on a joint account, and that on decease of one the receipt of the survivors should be a discharge. By the Conveyancing Act, 1881, provisions having the effect of the joint account clause are in the absence of contrary agreement incorporated in every mortgage made after 1881, in which the money is expressed to be advanced by several persons on a joint account, or jointly and not in shares. By the **C. A. 1911**, s. 9, trustee mortgagees who under the Statutes of Limitation or by foreclosure have become entitled to the mortgaged property, discharged from the right of redemption, are to hold it on trust for sale.

S. 61.

Subject to the L. C. A. 1900, judgment debts are a charge on the interest of the mortgagee.

Transfers of Mortgages are effected by assignment of the mortgage debt and interest to the new mortgagee, and a conveyance of the lands to him subject to the equity of redemption. Under the C. A. 1881, a mortgagor may compel a mortgagee who has not taken possession to assign the debt and convey the property to any third person.

S. 15.

An equity of redemption may itself be mortgaged, but if the second is made without disclosing the first, the mortgagor by 4 & 5 *W. & M. c.* 16, will lose his equity of redemption. A mortgagee who has obtained the *legal* estate has priority over all subsequent charges except those created by his authority as well as over any previous equitable charge of which he had no notice.[1]

If a mortgagee having the legal estate makes a further

[1] See *Taylor* v. *London and County Banking Co.*, 1901, 2 Ch. 231; *Northern, &c. Insurance Co.* v. *Whipp*, 26 Ch. D. 482; *Walker* v. *Linom*, 1907, 2 Ch. 104; *Grierson* v. *Nat. Prov. Bank of England*, 1913, 2 Ch. 18.

advance without notice of any intermediate mortgage, he has a first charge for the whole of his advances. And a third or subsequent mortgagee who had no notice when he took his security of any but the first mortgage, can, if he obtains a transfer of the legal estate of the first mortgagee, **tack** this to his own and squeeze out any intermediate mortgage.

See *Taylor* v. *Russell*, 1892, A. C. 244.

Bailey v. *Barnes*, 1894, 1 Ch. 25.

As between themselves equitable charges as a rule, and in the absence of fraud or negligence, rank in the order of their creation.

See *Farrand* v. *Yorkshire Banking Co.*, 40 Ch. D. 182.

Mortgages of lands in Middlesex or Yorkshire require registration like purchase deeds. Under the Middlesex Registry Act mortgages have priority according to the date of registration, except that a mortgagee who took the legal estate without notice and has registered has priority over previously registered equitable charges. Mere registration does not in Middlesex prevent tacking if a third mortgagee had not in fact notice of the intermediate mortgages. The Middlesex Act does not apply to equitable mortgage by deposit of title deeds without any writing, nor to a vendor's lien.

Under the Yorkshire Registry Act, 1884, registration gives absolute priority, except in case of fraud, in spite of actual or constructive notice, and tacking is impossible except as against interests created before the Act. Vendor's liens or charges created by deposit of title deeds have no effect or priority against registered assurances for valuable consideration unless registered under the Act.

S. 12.

S. 16.

Consolidation.—If A. mortgaged Blackacre to X. and then Whiteacre to X. for another debt, he could not redeem one without the other, and the mortgagee might enforce payment of both debts out of either property. The same applied if A. mortgaged Blackacre to X., then Whiteacre to Y., and subsequently both mortgages became vested in Z., unless the equity of redemption of one property was assigned by the mortgagor before both properties vested in Z.[1]

[1] *Vint* v. *Padget*, 2 De G. & J. 611; *Jennings* v. *Jordan*, 6 A. C. 698 *Harter* v. *Colman*, 19 Ch. D. 630; *Pledge* v. *White*, 1896, A. C. 187.

S. 17. By the C. A. 1881, consolidation is not allowed where the mortgages, or one of them, are made after 1881, unless a stipulation to that effect is expressed in the mortgage deeds *or one of them*.

CHAPTER XXIV.

OF TITLE.

In English law all title to land is founded on possession. It is *primâ facie* evidence of seisin in fee, and a person in possession has a good title against all except those who can prove a better. And long possession may even bar the rights of the true owners and give the possessor a good title against all the world.

3 & 4 Will. IV. c. 27, ss. 2, 14; 37 & 38 Vict. c. 57, ss. 1—9.

Actions for the recovery of land are governed by the **Real Property Limitation Acts, 1833 and 1874.** No entry may be made or action brought by any person to recover land except within twelve years after the right to do so accrued to him or someone through whom he claims, or within twelve years after a written acknowledgment of his title has been given to him or his agent signed by the person in possession. A person under the disability of infancy or lunacy when his rights first accrued has a further extension of six years, but cannot claim after thirty years in all have expired.

37 & 38 Vict. c. 59, ss. 3—5.

37 & 38 Vict. c. 57, s. 2.

The right to future estates accrues when they become estates in possession, but if the owner of the particular estate was not in possession when his estate determined, the owner of the future estate has either twelve years after the right of entry or action accrued to the particular tenant, or six years after it became vested in possession.

3 & 4 Will. IV. c. 27, ss. 21, 22.

If the right of a tenant in tail is barred, so also is the estate of anyone whom the tenant in tail might have barred. If a tenant in tail die while time is running against him, no person claiming under such estate has more time than the tenant in tail would have had if he survived.

Equitable estates must, as a rule, be claimed within the same time as legal. Where, however, land is vested in a trustee on any express trust, the right of the *cestui que trust* is deemed to have accrued when the land is conveyed to a purchaser for valuable consideration, and then only against the trustee and any person claiming through him. But the Statutes of Limitations apply to actions by a *c. q. t.* against a trustee except where the claim is to recover the trust property, or the proceeds thereof, which have been retained or converted by the trustee or is in respect of any fraudulent breach of trust.

3 & 4 Will. IV. c. 27, ss. 24, 25.

Trustee Act, 1888, s. 8.

Rents[1] and tithes in the hands of laymen are subject to the same rules as land.

For advowsons the period of limitations is three successive incumbencies, or one hundred years if they exceed that time, or sixty years if they do not amount to so much.

3 & 4 Will. IV. c. 27, s. 30.

Money secured by a mortgage or otherwise charged on land can be recovered only within twelve years after the right accrued, or the last written and signed acknowledgment of the right thereto.

Part ii., Chap. XIV.

By 9 *Geo. III.* c. 16, all Crown rights are barred after sixty years.

Prescription.—The title to purely incorporeal hereditaments depends upon *grant*, or on *prescription* from immemorial user (*i.e.*, user from the beginning of the reign of Rich. I.), by which a grant is presumed. Immemorial user was presumed on proof of twenty years' enjoyment, but might be rebutted by evidence to the contrary. This rule still governs all cases not within the **Prescription Act, 1832.**

By this (i.) no right of common or *profit à prendre*, if enjoyed without interruption for thirty years before action, can be defeated merely by showing it was first enjoyed prior thereto, and if enjoyed for sixty years the

S. 1.

[1] *I.e.*, "rents existing as an inheritance distinct from the land, not rents reserved on leases for years by contract between the parties" (*Grant* v. *Ellis*, 9 M. & W. 113; and see *Hunter* v. *Nockolds*, 1 Mc. & G. 640). See also Part ii., Chap. XIV.

right is indefeasible, unless it has been enjoyed under an
S. 2. agreement in writing; (ii.) for rights of way and other easements, watercourses and the use of water, the terms are twenty and forty years; (iii.) where light[1] is enjoyed
S. 3. with any building for twenty years without interruption, the right is indefeasible unless enjoyed under agreement
S. 4. in writing. The periods mentioned are in each case the periods *next before action*, and nothing is an interruption unless submitted to for one year after notice. The time during which a person is under incapacity, or during which
S. 7. any action is pending, is excluded from the above periods, save where the claim is declared indefeasible.[2] The Crown is barred by these provisions except in case of light.

Rights gained by prescription may be lost by abandonment, of which non-user for twenty years is generally sufficient evidence.

In former times a deed of feoffment usually contained
Ante, p. 25. a clause of warranty, and the word *give* had the effect of an implied warranty, which was, however, more limited in extent than the express warranty. Such clauses of warranty are now obsolete. In modern times every vendor of land is bound to show a good title, *i.e.*, evidence of ownership by himself and his ancestor for a number of years back. A vendor must therefore at his own expense furnish to the purchaser an *abstract of title*, verified by the production of the original documents, or their probate and office copies, showing the material parts of every instrument by which any disposition of the property was made during the time for which title has to be shown, and a statement of every birth, death, &c. or other event affecting its devolution.

C. A. 1881, s. 3. The purchaser must, in the absence of contrary agreement, bear the expense of producing all documents of title and other evidence not in the vendor's possession, and of the examination of title deeds by his solicitor.

[1] See *Colls* v. *Home and Colonial Stores*, 1904, A. C. 179; *Jolly* v. *Kine*, 1907, A. C. 1.

And subject to certain special provisions in case of ways and watercourses (s. 8).

In the absence of stipulation to the contrary, recitals and statements contained in deeds or instruments twenty years old are, unless proved inaccurate, sufficient evidence of the facts therein stated. C. A. 1881, s. 2; but see *Re Wallis and Grout*, 1906, 2 Ch. 606.

Apart from special contract, the following **title** must be shown:—(i.) To freehold or copyhold, forty years.[1] (ii.) To leasehold, the original lease and the title under the lease for not more than forty years before the date of the contract.[2] But *not* the title to the reversion, whether freehold or leasehold.[3] (iii.) To an advowson, one hundred years. (iv.) To tithes, the original grant and the title for forty years before the contract.

The abstract should commence with an instrument which forms a good *root of title*, *i.e.*, one which is beyond doubt and does not require the support of outside evidence, *e.g.*, a conveyance on sale; but not a will, as in that case evidence must be given of the testator's title. *Re Cox and Neve*, 1891, 2 Ch. 109.

A vendor need not necessarily show he has the whole estate if he has an equitable interest which will enable him to procure conveyance. If any other persons are interested in the land, this must be disclosed by the abstract, and their concurrence must be obtained. Thus, if lands are mortgaged, the mortgagee must be paid off out of the purchase-money and join in conveying the legal estate. The expense of such concurrences must be paid by the vendor. By the C. A. 1881, on sale of land subject to any mortgage or charge, the Ct. may allow payment into Ct. of a sum sufficient to provide for such charge with future costs, and may then, without the consent of the incumbrancer, declare the land free from the charge, and make any order for conveyance or vesting order. S. 5, amended by C. A. 1911, s. 1.

On mortgage of land, title is investigated in the same way as on sale, the mortgagee requiring a good marketable title, which will enable him, if necessary, to sell again without difficulty.

A contract for sale may be specifically enforced by

[1] Vendor and Purchaser Act, 1874, s. 1.
Ibid.
[2] *Ibid.*, s. 2; C. A. 1881, s. 3.

either the vendor or purchaser, but not a contract to lend or borrow money.[1]

Vendor and Purchaser Act, 1874, s. 2; C. A. 1881, s. 33.

On a contract to *grant* a lease the lessee has no right to call for the title to the freehold, but on a contract for an underlease the lessee can call for the lease and the subsequent or the last forty years' title thereunder, but not the title to any leasehold reversion.

On the completion of a sale or mortgage the purchaser or mortgagee is entitled to all documents of title relating exclusively to the property. This, except where registration is compulsory, is his only protection. Even this is inadequate in some cases: thus, it does not protect him if a previous rent-charge has been granted out of the lands, the grantee in such a case having no right to the deeds. In case of reversions there is not even this protection, as the reversioner has no deeds that he can give.

On a sale of a reversion the onus was formerly on a purchaser to show that he gave the fair price; but by the Sales of Reversions Act, 1868, no purchase can be set aside on mere ground of undervalue if made without fraud.

S. 16.

By the C. A. 1881, a mortgagor, while his right to redeem lasts, is entitled to inspect and make copies of documents of title in possession of the mortgagee.

The vendor is entitled to retain any documents which relate also to other property retained by him. Where title deeds cannot be delivered to a purchaser, he is entitled to have a written *acknowledgment* of his right to their production, and to copies thereof.

S. 9.

By the C. A. 1881, this imposes on every possessor of the documents, *while they are in his control*, the obligation to produce them whenever required for proving the title of the purchaser. By the same section, if the person retaining deeds gives a written *undertaking* for safe custody, that imposes on him an obligation, while he has possession, to keep them safe and undefaced, unless prevented by inevitable accident.

In Middlesex and Yorkshire search is made in the

[1] Except a contract to take debentures (Companies Act, 1908, s. 105).

registries for any registered assurances affecting the lands. The principal searches necessary in all counties are those for disentailing deeds, for deeds acknowledged by married women before 1883, writs and orders affecting land and *lites pendentes*, land charges, life annuities, bankruptcies, insolvencies and deeds of arrangement. In case of copyhold the Ct. rolls are always searched.

After all searches are made the transaction is completed by conveyance and payment of the consideration money. By the C. A. 1881, payment may be made to the vendor's solicitor if he produces a deed having in the body thereof, or indorsed thereon, a receipt, the deed being executed or the indorsed receipt being signed by the vendor. S. 56.

By the Trustee Act, 1893, the receipt of a trustee for money, securities and other personal property payable to him under a trust is a sufficient discharge, and the person so paying, &c. is not bound to see that the money, &c. is duly applied pursuant to the trust. S. 20. See also s. 23.

Covenants for Title.—The old warranty has now been superseded by covenants for title entered into by the vendor, for breach of which the remedy is an action for damages. The ordinary covenants are: 1. For **right to convey**; 2. For **quiet enjoyment**; 3. For **freedom from incumbrance**; 4. For **further assurance.**

A vendor is entitled to limit his responsibility to the acts of those who have been in possession since the last sale. A mortgagor always covenants absolutely. Trustees covenant merely that they themselves have done no act to incumber the premises.

On conveyance of freeholds the covenants for title are included in the deed of conveyance; in case of copyholds they are contained in a deed of covenant to surrender.

By the **C. A. 1881,** the following covenants are implied in conveyances made by deed after 1881:— S. 7.

1. In a conveyance for valuable consideration except a mortgage, the four usual covenants by a person who conveys and is expressed to convey as *beneficial owner* limited to his own acts and those through whom he derives title otherwise than as purchaser for value.

2. In a conveyance of leasehold as above, a further covenant (also limited) that the lease is valid, the rent paid, and the covenants performed.

3. On a mortgage by a person who conveys, &c. absolute covenants for title.

4. On mortgage of leasehold an additional covenant (absolute) for validity of the lease, and for indemnity against the rent, and covenants of the lease, so long as any money remains in the security of the conveyance.

5. On settlement a covenant for further assurance by a person who conveys, &c. as *settlor*, limited to his acts and those of persons claiming under him subsequent to the conveyance.

6. On any conveyance a covenant (limited to his own acts only) against incumbrances by everyone who conveys as trustee, mortgagee, personal representative of a deceased person, &c.

S. 4. Formerly, covenants for title were implied in some cases, *e.g.*, from the words "give" or "grant." Now, by the R. P. A. 1845, such words imply no covenant except where expressly provided by statute.

Markham v. *Paget*, 1908, 1 Ch. 697. On a lease for years the word "demise," or other similar words, implies a covenant for quiet enjoyment so long as the lessor, or anyone claiming through him, has any estate in the land. Usually, however, the lease contains an express covenant by the lessor limited to his own acts only, and such express covenant will nullify the covenant implied from the word "demise."

PRESENT FORM OF A CONVEYANCE.

Date. THIS INDENTURE, made the first day of January, 1882,

Parties. BETWEEN A. B., of Cheapside, in the City of London, Esquire, of the one part, and C. D., of Lincoln's Inn, in the County of Middlesex, Esquire, of the other part.

Testatum. WITNESSETH that in consideration of the sum of one

Consideration. thousand pounds now paid by the said C. D. to the said

Nature of transaction. A. B. for the purchase of the unincumbered fee simple in possession of the hereditaments hereinafter described (the

Receipt. receipt of which sum the said A. B. doth hereby acknow-

ledge), the said A. B. doth hereby grant *as beneficial owner* unto the said C. D. Operative words.

ALL THAT messuage or tenement [usual description of the property]. Parcels.

TO HAVE AND TO HOLD the same premises unto and TO THE USE of the said C. D. in fee simple. Habendum.

IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

The chief respects in which the foregoing differs from a conveyance on sale made before 1882 are (1) The "general words" which were formerly inserted after the parcels for the purpose of passing advantages in the nature of easements are no longer necessary. (2) After the "general words" there was before 1882, where the entire interest of the conveying party was transferred, an *estate clause* for the purpose of passing any estate or interest vested in him and distinct from the estate, &c. which he purported to convey. Now by the C. A. 1881, every conveyance, unless a contrary intention is expressed, passes all the interest and estate of the person conveying; hence such a clause is unnecessary. (3) Formerly the covenants for title which are now implied by the use of proper statutory words were inserted at length. (4) A receipt for the consideration was formerly indorsed upon the deed; now by the C. A. 1881, a receipt in the body of a deed is a sufficient discharge. C. A., 1881, s. 6. S. 63. *Ante*, pp. 109, 110. Ss. 54, 55.

CHAPTER XXV.

REGISTRATION UNDER THE LAND TRANSFER ACTS, 1875 AND 1897.

REGISTRATION under these Acts is voluntary except in the county and city of London, where it is, with certain exceptions, of which the chief are leases with less than forty years to run, or two lives to fall in, and incorporeal hereditaments, compulsory on sale.

What may be registered.—Freehold but not copyhold. Leasehold if (*a*) created mediately or immediately out of freehold; (*b*) held for a life or lives, or term of years of which more than twenty-one are unexpired; (*c*) *not* created for mortgage purposes.

Who may register.—(1) A person who has contracted to buy for his own benefit provided the vendor consents. (2) A person entitled for his own benefit. (3) A person who has a power of disposition for his own benefit, &c. (4) A person holding the lands on trust for or with a power of sale—with the consent of any other person whose consent is necessary for the exercise of the power or trust. (5) Any two or more persons entitled for their own benefit, whether concurrently or successively.

Registration may be with **absolute, possessory,** or **qualified** title.

An **absolute** title is registered only if approved of by the registrar. The application must be accompanied by (1) All documents relating to the title which the applicant has in his possession or under his control. (2) A copy or abstract of the latest document of title not being a document of record. (3) Sufficient particulars to enable the land to be identified. If the applicant has no documents of title a statutory declaration of possession by himself and his predecessors may be taken as *primâ facie* evidence of his right. The title is fully examined, except in certain cases in which the registrar has power to modify the examination, and the application is advertised so as to give an opportunity for objections to be made. The title cannot be registered until any objection is withdrawn or disposed of.

Incumbrances to which the fee simple is subject must be entered on the register, and a statutory declaration must be made that they have all been disclosed. Provisions are also made for the stamping and marking of the documents of title so that the registration cannot be concealed.

On application for registration of an absolute title, if the title can be established only for a limited time, or subject

to reservations, it may be registered as a **qualified** title, which is the same as an absolute title, save that it is subject to any such right, title, or interest which is excepted from the registration.

A **possessory** title, which is all that need be registered even where registration is necessary, is registered without any examination of title or advertisement of the application. The same documents must be produced as on application for registration with absolute title, but it is sufficient if they afford *primâ facie* evidence of the applicant's right. In this case also, as well as upon registration of an absolute or qualified title, provisions exist as to the marking of documents of title and the entry on the register of incumbrances.

Leaseholds.—The same rules in general apply. The lease or an abstract thereof or other evidence of its contents must be produced; and if an absolute title is required, the title to the freehold and any intermediate leasehold must also be approved.

On entry of a person's name, a **land certificate** is prepared stating the title registered, and may be delivered to him or deposited in the registry.

The effect of first registration of a person with an **absolute** title (*a*) in case of **freeholds** confers on him an absolute estate in fee simple, subject to any incumbrances, and unless the contrary is expressed, to any liabilities declared by the Act not to be incumbrances, *e.g.*, easements and rights to minerals, and subject to any unregistered estates, interests or equities, *e.g.*, those of a *c. q. t.* where a trustee is registered; and (*b*) in the case of leaseholds, the possession of the land for all the leasehold estate described, subject also to the covenants in the lease.

Registration with a **qualified** title has the same effect, save that excepted interests are not affected. Registration with a **possessory** title does not affect any adverse estate or interest subsisting or capable of arising at the date of registration.

Settled land may be registered either by the life tenant or the trustees of the settlement.

Subject to the right of the registered proprietor to deal with the land, the rights of the persons entitled under the settlement are unaffected by the registration. No trusts are entered on the register, but the rights of any *c. q. t.* may be protected by the entry of *restrictions* and *inhibitions*.

Transfers of registered land by a *registered* owner must be made in the prescribed form, and until entry in the register the purchaser gets merely an equitable estate. Subject to the rights of the registered proprietor, any person who has any interest or right in registered property may create estates and interests therein as if it were not registered, and any person entitled to such unregistered interests may protect them against any act of the registered proprietor by entering *cautions* and *inhibitions*.

Where the title is *absolute*, a registered transfer for valuable consideration transfers the whole interest of the owner subject to any incumbrances, and to any interests declared not to be incumbrances, and, in case of leaseholds, to all covenants and obligations. Where the title is *qualified*, such a transfer does not affect any excepted rights, and where it is *possessory*, it does not affect any adverse rights subsisting or capable of arising at the time of the registration of the first registered proprietor.

If the transfer is voluntary it is also subject to any unregistered interests created by the registered proprietor.

On every entry of a disposition by the registered proprietor, the land certificate must be indorsed accordingly.

Any registered transfer made for valuable consideration extinguishes all estates, &c., created under unregistered dispositions by the registered proprietor, save such as are declared not to be incumbrances.

Registered charges may also be created in prescribed forms. In such charges, in the absence of any entry to the contrary, covenants to pay the principal and interest are implied, and in case of leaseholds to pay the rent and perform the conditions thereof, and indemnify the chargee therefrom. Subject to any agreement, the chargee only gets the certificate of charge and not the land certifi-

cate. Subject to any entry to the contrary, the chargee has (1) powers of entry subject to the rights of prior incumbrancers and the liabilities of a mortgagee in possession; (2) powers of foreclosure and sale. On obtaining an order for foreclosure absolute the chargee is entitled to be registered as the proprietor, and then obtains the legal estate.

Subject to any entry to the contrary, registered charges rank according to the order in which they are entered.

Transfers of a registered charge are made by registered transfers in a prescribed form, and are not complete until entry, the certificate of charge being delivered to the transferee.

Subcharges may be made in the same way as charges, and a similar certificate issued.

The **cessation** of a registered charge must be notified on the register at the requisition of the registered proprietor thereof, or on due proof of satisfaction, and thereupon the charge ceases.

A registered proprietor of land or a charge may, subject to any registered charges, create a charge thereon by deposit of the land certificate, and such charge will have the effect of an equitable mortgage.

A person entitled to an incumbrance prior to the first registration may be registered as the proprietor of such incumbrance, and a **certificate of incumbrance** is issued to him.

On death of a sole proprietor, his personal representatives are entitled to be registered, or with their assent a devisee or legatee, or upon a transfer from them the heir or next of kin. On the death of a life tenant, the trustees of the settlement must apply for the registration of his successor.

On bankruptcy the official receiver or trustee, or his transferee, may be registered.

A purchaser of registered land can require no **evidence of title**, except (*a*) such as may be obtained from an inspection of the register, or a certified copy of or extract from the register; (*b*) a statutory declaration as to the existence

or not of matters declared not to be incumbrances; (*c*) in case of an absolute title, evidence of the title to, or the discharge of, any incumbrances entered on the register as subsisting at the first registration; (*d*) in case of a qualified title, the same, and such evidence as to excepted rights or interests as he could require if the land were unregistered; (e) in case of a possessory title, such evidence of the title subsisting at the first registration as he could require if the land were unregistered.

Where the vendor of registered land is not himself registered, he must at the purchaser's request either procure his own registration or a transfer from the registered proprietor to the purchaser.

In the absence of special stipulation a vendor registered with an absolute title is not required to enter into any covenants for title, and a vendor with possessory or qualified title is only required to covenant against estates and interests excluded from registration.

On application to register land with an absolute title any liability to succession or estate duty must be registered. Unless so noted, it does not affect a *bonâ fide* purchaser for full consideration.

Instruments or applications delivered for registration take effect from the time of delivery. A **priority notice** may be lodged reserving priority for a specified instrument or subsequent application, which, if then delivered, within fourteen days, has priority from the date of the notice.

Any person interested in any land or charge may lodge with a registrar a **caution,** which prevents any registration of any dealings with such land without notice to him. A caution may also be registered against registration of land not yet registered.

An **inhibition** is an order or entry made upon the application of any person interested, &c., and forbidding, until the occurrence of a specified event or until further order, any further dealings with the registered land or charge.

A **restriction** is an entry made on the application of a registered proprietor forbidding any transfers or

charges unless certain specified conditions are complied with.

The Court may order a rectification of the register. Subject to any estates or rights acquired by registration, any person aggrieved by any entry, omission of entry or default in registration, may apply for rectification. If any error or omission of entry is incapable of rectification, such person is entitled to be indemnified unless the loss has been caused or contributed to by his own fault. Such indemnity may be recovered from any person who has caused, &c., the loss.

A title to registered land cannot be acquired by adverse possession. But any person who, but for this, would have acquired a title under the St. Limitations, may apply for an order to rectify the register by his entry as registered proprietor.

The register consists of (*a*) The **Property Register,** containing a description of the land, with notes as to easements, conditions, covenants, &c. (*b*) The **Proprietorship Register,** stating the nature of the title, the name, address and description of the proprietor, and any caution, inhibition and restriction. (*c*) The **Charges Register,** containing incumbrances and all dealings with registered charges or incumbrances that are capable of registration.

The register is not open to public inspection.

APPENDIX OF QUESTIONS.

For complete answers to these questions, which have all been set in various examinations, reference should be made to Williams' Real Property, and not merely to this Analysis.

1. Explain and illustrate by examples the terms "corporeal," "incorporeal," "tenement," "hereditament," as applied to property. Is "real" property synonymous with "immovable" property, and "personal" with "moveable," respectively? If not, point out the differences.

2. What were the chief incidents attending the relation of lord and vassal in feudal tenures?

3. What are the provisions of the Statute known as Quia Emptores? Explain the consequence of the passing of that Act with reference to the transfer of real property.

4. What difference was there in the method of conveying a fee simple in land and of creating an easement over land before the Statute of Uses? Is there any difference at the present day?

5. What is the effect of a gift by will to a man and "the heirs of his body" of (a) freeholds; (b) copyholds; (c) leaseholds?

6. What are the chief incidents of gavelkind tenure, and where does the tenure chiefly occur?

7. What is the law governing conveyances to trustees for charitable purposes?

8. Distinguish between an heir apparent and heir presumptive, and illustrate your answer by an example in each case.

9. A peer and his eldest son, being tenant for life and tenant in remainder, are desirous of resettling the family freehold estates. What is the nature of the first deed to be prepared, who would be parties to it, and how should it be perfected?

10. What is a base fee? By what means can a base fee be converted into a fee simple?

11. Distinguish between the powers of a tenant for life of land according as he holds with or without impeachment of waste.

12. What power has a tenant for life of a freehold estate to cut timber or work mines?

13. Specify the regulations respecting leases generally and building leases particularly contained in the Settled Land Act, 1882.

14. Who are the trustees for the purposes of the Settled Land Acts, and what are their functions?

15. How does the Settled Land Act protect the remainderman against a fraudulent exercise by the tenant for life of the powers vested in him by that Act?

16. What persons can exercise the powers of a tenant for life under the Settled Land Acts?

17. Explain how a title by "special occupancy" arises.

18. What is the difference between a joint tenancy and a tenancy in common? How can a joint tenancy be severed?

19. Land is conveyed to A. and B. in fee simple. A. predeceases B., having left his share by will to C. Who would be entitled to A.'s share, and why?

20. Point out the different means by which a partition of land may be effected. By what persons may such a partition be effected?

21. What were the provisions of the Statute of Uses? For what object was the Statute passed?

22. Explain the doctrine that there cannot be a use upon a use, and what resulted therefrom.

23. A. was sole trustee of freeholds and copyholds of inheritance for B. A. and B. died intestate in 1906. On whom did their respective estates in the trust property devolve? Would the devolution have been different had A. and B. died in 1896, and if so, how?

24. State the different modes in which new trustees may be appointed.

25. By what form of deed are freeholds held in fee simple now conveyed? Does such a deed operate under the Common Law or by any, and if so what, statute?

26. An executor derives his powers from the will; an administrator from the grant of letters of administration. Explain this rule and show the chief practical consequences which result from it.

27. State shortly the effect of the Land Transfer Act, 1897, as regards—(a) the devolution of a testator's real estate; (b) the powers of executors over their testator's real estate; (c) the granting of probate of a will of real estate where the testator leaves no personal estate.

28. Before the Inheritance Act, 1833, from whom was descent traced to an estate in fee simple? What is meant by the expression "the last purchaser" as used in that Act? Is descent since that Act ever traced from a person other than the last purchaser, and if so, in what cases?

29. Two ladies succeeded to their father's residuary real estate as his co-heiresses-at-law. They were also entitled to the family mansion under their father's will, he having devised it to them as joint tenants. One of the two ladies consults you as to what will become of her property if she dies intestate. How would you advise her?

30. In what ways can an estate in coparcenary be dissolved?

31. In ascertaining the heir of a deceased purchaser what ancestors and their descendants, and in what order, must be exhausted before the purchaser's own mother can inherit?

32. A. has a son B. by his first wife, and two sons, C. and D., and a daughter by his second wife. C. purchases real estate and dies after A., intestate and a bachelor. D. also predeceases C. without leaving any issue. Who will be entitled to C.'s real estate, and why?

33. State the requirements of the Wills Act, 1837, as to the execution and attestation of wills.

34. What provisions were made by the Wills Act, 1837, affecting the competency of an attesting witness to the will, and a beneficial gift or appointment to such witness?

35. In what way can a will be revoked other than by a new will or codicil?

36. What provision is made by the Wills Act, 1837, to prevent lapse in the case of gifts to one of a testator's children?

37. Freeholds are by will devised "to A. in fee simple, but if he dies without issue, then to B." (a) What is the technical description of such a gift? (b) is it valid? and (c) can A. in any event obtain an indefeasible title to the property during his life?

38. A. being the owner in fee of a house devises the same by will to B. without adding the words "and his heirs" or any other equivalent words. What estate does B. take under the devise, and why?

39. A., devisee under a will of real estate in Middlesex, agreed to sell to B. in 1896. State the provisions of the Vendor and Purchaser Act, 1874, for the protection of B.

40. A judgment creditor desires to obtain payment of his judgment debt out of lands belonging to the judgment debtor. Explain the process by which this is done.

41. What powers of sale have executors over the freeholds of testators who died (a) before, and (b) since the 1st January, 1898?

42. Who are the persons to exercise powers of management over property of which the owner is an infant?

43. A husband and wife were married in 1880. What are now the rights of the husband during the life of his wife over (1) freeholds; (2) leaseholds belonging to the wife?

44. What are the rights to-day of a husband in the freeholds and leaseholds of his wife on her death intestate?

45. What is meant by a restraint on anticipation affecting a married woman's property? Can it be removed?

46. A married woman is entitled to freehold land in fee simple under the will of her uncle, who died in 1869. How can it be conveyed to a purchaser (a) if she married in 1880; (b) if she married in 1890?

47. What is dower? Show why the subject of dower has not now the importance which it possessed at the commencement of the 19th century.

48. State the rule in *Shelley's Case*, and illustrate it by example.

49. Real estate is given to A. for life, remainder to B. for life, remainder to the heirs of A. Advise A. whether he can dispose of the property by will or not, and give your reasons.

50. The principle of the common law is that the seisin of the freehold can never be in abeyance. What two rules upon the limitations of contingent remainders are the consequence of this principle?

51. What is an executory interest in land? By what means may it be created, and how may it be disposed of?

52. What is the difference between a "springing use" and a "shifting use"? and give an example of each.

53. Explain and illustrate the nature of the distinction between general and special powers of appointment.

54. A. is anxious to settle his freehold land so as to make it remain in his family for ever. Explain how and to what extent this ca · be done, and in what ways his intentions are likely to be defeated.

55. Land is granted to A., a bachelor, for life, and after his death to his first son who attains the age of twenty-four years. A. dies and leaves a son aged twenty. Discuss the nature and effect of this limitation, particularly having regard to the Act of 1877.

56. State the four periods which the Thellusson Act substituted for the pre-existing limits to accumulation, and explain in what way the law on this subject has again been recently restricted.

57. What are *primâ facie* the rights of the lord of the manor in (a) the waste lands of the manor, (b) the lands held by his copyhold tenants ?

58. By a will which you are instructe· ·o draw a daughter is to be entitled to receive out of certain land, or out of the income thereof, an annual sum of money. What powers will be vested in the daughter for the recovery of the money if no special provisions are contained in the will ?

59. The owner of a copyhold estate desires to create a tenancy in tail in his copyhold, and accordingly he limits it to his son and " the heirs of his body." What is the effect of this limitation, and why ?

60. The owner of copyhold property dies intestate and without heirs. What becomes of the copyhold property ? May it be dealt with again as copyhold property, and if so by whom and subject to what limitations ?

61. What are the respective rights of the surrenderor and surrenderee of copyhold property, between the time of surrender and admittance ?

62. Why can the Statute of Uses have no application to the limitations of copyhold property ?

63. How may a tenancy from year to year arise by construction of law ?

64. In what cases is a deed necessary for the creation of a valid lease?

65. What are the covenants which a lessor would be entitled to insist upon in a lease of a house, for the granting of which he had entered into an open contract?

66. What classes of covenants by lessors and lessees respectively run with the land at law so as to bind the assigns of the covenantor? Why is the law as to covenants in leases running with the land different from that relating to similar covenants in conveyances on sale of the fee simple?

67. Land is leased to A. for forty years at the yearly rent of £100, and subject to covenants to repair, &c. A. assigns to B., and B. subsequently assigns to C., who makes default in payment of the rent, and also allows the property to fall into disrepair. Has the landlord any remedy against A., B. or C.?

68. What changes in the law relating to forfeiture for breaches of covenants contained in leases were made during the 19th century? Do such changes include all lessees' covenants, or are there any, and if so what exceptions?

69. A lessee has committed a breach of the covenants in the lease as to repairs. What steps must the lessor take before commencing proceedings to forfeit the lease?

70. What is the effect of the bankruptcy of a tenant on the rights of his landlord?

71. A. holds a lease from B., and is willing either to assign it to C. or to grant him a lease for the rest of the term less one day. What is the difference as regards C.'s liability to B. if C. takes an assignment instead of a lease? Give your reasons.

72. Explain the question "satisfied term." What were the provisions of the Satisfied Terms Act, 1845?

73. Give a short account of the changes of the law relating to the granting of leases by mortgagors, mortgagees, and tenants for life respectively during the 19th century.

74. When can a term of years be enlarged into a fee simple? By whom can it be enlarged, and how?

75. State the proper parties to re-convey mortgaged property when the mortgagee has died—(1) in 1870; (2) in 1880; (3) in 1890. Distinguish in each case between freehold, copyhold and leasehold property.

76. Explain the expression "once a mortgage always a mortgage."

77. Enumerate the powers conferred upon a mortgagee by the Conveyancing and Law of Property Act, 1881, and what restrictions are thereby imposed upon the exercise of some or any of such powers.

78. A. mortgaged real property in 1880, and has allowed the mortgagee to remain in possession for some years. Within what time is A. entitled to redeem the property?

79. What are the objects and effects of stating in a mortgage deed that the sum advanced is advanced by the mortgagees out of money belonging to them on a joint account?

80. Distinguish between tacking and consolidation of mortgages. Give particulars of any legislation since 1870 affecting these matters.

81. What periods of enjoyment are provided by the Prescription Act as conferring an indefeasible title to the following rights in the absence of consent or agreement in writing, and where there has been no interruption in the enjoyment: (a) Rights of common; (b) Rights of way and water; (c) Rights of light?

82. What is the position of a purchaser of leaseholds under an open contract with regard (1) to the length of title which he can require; (2) the possible risks which he incurs?

83. What changes were made during the last thirty years of the 19th century in the relative rights and liabilities of vendors and purchasers of land under open contracts?

84. A. mortgages leaseholds as beneficial owner. What covenants are implied in such a case?

85. What covenants are implied in a conveyance of freeholds on sale where the vendor is expressed to convey (a) as beneficial owner, and (b) as mortgagee?

86. Distinguish between the obligations entered into by a vendor and mortgagor respectively when conveying as beneficial owner.

87. What alteration did the Conveyancing Act, 1881, make with regard to the grant of easements?

88. In the case of registered land, what covenants for title is the purchaser entitled to demand of his vendor when the title registered is (1) absolute; (2) possessory?

89. Can a title to registered land be acquired by adverse possession?

90. What evidence of title can a purchaser of registered land require?

PART II.—PERSONAL PROPERTY.

TABLE OF CONTENTS.

PART II.

PERSONAL PROPERTY.

CHAPTER I.

Introductory.

THE OBJECTS AND NATURE OF PERSONAL PROPERTY.

Personal property, as we have seen, consists of *chattels real*, *i.e.*, any interests in land less than freehold, and *chattels personal*. A freeholder, if dispossessed, could obtain *restitution* by a **real** action, but an owner of chattels had merely a **personal** action for the recovery of damages.

Remedies for the Recovery of Goods.—The most ancient remedy for an owner or possessor of goods who had lost possession unwillingly was an action of theft, which lay against any person in whose possession the goods were found and in which the owner might obtain restitution of the goods and, in case of theft, punishment of the thief. The owner might also sue civilly without alleging theft, but in that case the defendant could absolve himself by paying the *value* of the goods. On its civil side this action was superseded in the thirteenth century by the action of **trespass**, and it remained only as an **appeal of larceny**, *i.e.*, a criminal proceeding at suit of the party injured against one guilty of theft.

Restitution of the stolen goods could also be obtained in an appeal of larceny. But by a strained construction of the laws of forfeiture it was held that, on the conviction of a thief in an appeal, not only his own chattels but also the stolen goods were forfeited to the Crown. And in case of a conviction upon **indictment**, *i.e.* at suit of the Crown, the stolen goods were also forfeited and the owner could not obtain restitution unless he sued an appeal. Thus the restitution changed its nature and was considered a waiver of the King's right to forfeiture rather than an

enforcement of the owner's title. Appeals of larceny were abolished in 1819.

Civil Remedies for the Recovery of Goods.—In place of the old proceedings for restitution the following remedies were developed.

1. The action of **trespass** *de bonis asportatis* for the direct violation of the possession of goods. This lay only against the actual taker and was an action for *damages* only and not for recovery of the goods, the property in which passed to the trespasser.

2. The action of **replevin,** which originally lay to recover damages for unlawful distress. Goods taken in distress were considered to be in the custody of the law, and the plaintiff might, on giving security to prosecute his claim for damages, obtain their re-delivery. At first however this was technically impossible if the defendant even *claimed* the goods as his own, but later it was held that, if the property were in fact the plaintiff's at the time of the taking, the sheriff might proceed to replevy the goods. Hence in any unlawful taking the plaintiff might, instead of bringing trespass whereby he lost the property in the goods, bring replevin, whereby he recovered it. Replevin, like trespass, lay only against the actual taker.

3. The right to peaceably **retake** the goods wherever found, unless they had been sold in **market overt** to a person buying in good faith.

Post, p. 71.

4. The action of **detinue.** This was originally an action for breach of contract to deliver a specific chattel, but was extended to the case of **detention** of goods by a finder, and later might be brought against anyone who detained goods, however he had obtained possession of them. Judgment was for the return of the goods *or* their value.

5. The action of **trover.** This was originally an action for damages against a finder of goods who had *converted* them, but later might be brought against anyone who had by any means come into possession of goods and refused to restore them, the refusal amounting to a **conversion,** which was the gist of the action.

Trespass and replevin were therefore remedies for the

violation of *possession*, while trover and detinue were remedies for the violation of the *right to possess*. But all these actions were founded solely upon rights relating to *possession*, no action existed at C. L. merely to determine disputes as to the *ownership* of goods.

In no personal action, moreover, except replevin, was there any process for obtaining specific restitution of goods as in the case of actions for recovery of immoveables. Part I., Chap. I.

Trespass and trover were for damages only, and even in detinue the plaintiff might only recover the value of the goods if the defendant refused to restore them. Since 1854, however, the Ct. may order execution to issue for the delivery of goods, without giving the defendant the option of paying their value.

Replevin is also an action for damages, though re-delivery of the goods forms part of its process.

Under the present practice every action is commenced by a *writ of summons* indorsed with a simple statement of the nature of the claim, and the old forms of action are abolished.

Equitable interests may exist in chattels and are generally of the same nature as equitable estates in land.

Thus if chattels personal are assigned to A. on trust for B., A. has the legal ownership, but B., the *cestui que trust*, has the equitable interest, which he can enforce against everyone except a *bonâ fide* purchaser for value from A., without notice of the trust.

Trusts of chattels were not affected by the Statute of Uses, nor is their creation required to be proved by writing under the Statute of Frauds.

Personal property may also be divided into :—

(*a*) **Choses in possession,** *i.e.*, moveable tangible goods the subject of physical possession.

(*b*) **Choses in action.**—"The term 'chose in action' is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession."[1] A mere right of action was at C. L. incapable of transfer as

[1] *Torkington* v. *Magee*, 1902, 2 K. B. at p. 430.

being the right to the performance of a duty owed by a particular person to a particular person. Hence a debt could not be directly assigned. Indirectly, however, an assignment could be effected by **novation,** *i.e.*, if A. owed money to B. a new agreement might be made by consent of A., B. and C. by which A. should pay the money to C. Moreover A. might give his consent in advance by undertaking to pay either to B. or to his *assigns*. This led to the introduction of Bills of Exchange, *i.e.*, written orders from A. to B.—his debtor—to pay a sum of money on a certain day to a named person or to the bearer of the order. Such an order *when accepted* bound B.—the acceptor—to pay to any *bonâ fide* holder of the bill, and thus the right to sue became transferable by the mere delivery of the bill. Later a bill of exchange payable to a named person or his *order* also became transferable by *indorsement* of the payee's name and delivery of the bill.

A chose in action might also be assigned by A.—the person entitled to the right—giving to a third person a **letter of attorney,** empowering him to sue on the claim in A.'s name.

A chose in action might be either *legal*, *i.e.*, recoverable by action at law, or *equitable*, *i.e.*, recoverable only by suit in Chancery, *e.g.*, a legacy. In equity *all* choses in action[1] were assignable, but if they were legal the assignee could sue only in the name of the assignor; if equitable he could sue in his own name.

Post, p. 75.

An assignee of a chose in action must, in order to protect his rights, give **notice** to the person bound, and the assignment was—except in the case of negotiable instruments—**subject to equities.** Thus if A. owed money to B., and B. assigned to C., A. might when sued by C. avail himself of any defence or set-off which he would have had against B.

A. C. T., Part I., Chap. VII.

By the Judicature Act, 1873, an assignment of any *debt* or *legal* chose in action may be made so as to pass the *legal* right, and all remedies provided that it is

[1] Other than a *bare* right of action. See *Glegg* v. *Bromley*, 1912, 3 K. B. at p. 490.

(1) *absolute* and not by way of charge[1]; (2) *in writing* under the hand of the assignor; (3) that *notice in writing* has been given to the debtor or person liable. But the assignment is, as before, *subject to equities*.

Modern personal estate also includes many forms of property unknown to the early C. L., *e.g.*, (*a*) **mortgages**—the charge created by a mortgage being personal estate in equity; (*b*) **negotiable securities**, which are tangible *evidence* of a chose in action; (*c*) **Government annuities or stock and shares or debentures of joint stock companies**, which are choses in action[2]; (*d*) **copyrights and patents**, which are *monopolies*, but differ from other obligations in that, although choses in action, they are rights available against the whole world.

CHAPTER II.

OF CHOSES IN POSSESSION.

Part i., Chap. I.

CHOSES in possession are tangible moveable things, the ownership of which differs from that of land in that (1) it is *absolute* and not derived out of any other superior ownership; (2) it is *indivisible*, *i.e.*, it cannot be divided into smaller successive interests, whereas an estate in fee simple in land can be divided into smaller estates taking effect successively.

Note that **ownership, possession** and the **right to possess** are distinct from each other and may be separated. An owner need not have possession, and if out of possession, may or may not have the right to possess. Possession may exist without ownership, and is protected against all but the owner,[3] and even against him if he has parted with his right to possession.

[1] *Hughes* v. *Pump House Hotel*, 1902, 2 K. B. 190; *Durham* v. *Robertson*, 1898, 1 Q. B. 765.

[2] *Colonial Bank* v. *Whinney*, 30 Ch. D. 261; 11 A. C. 426.

[3] *Armory* v. *Delamirie*, 1 Str. 505.

Ownership may be acquired—

(1) Through a previous title, *e.g.* (*a*) by succeeding to the title of a previous *owner* as on sale; (*b*) by succeeding to a previous *possessor* under circumstances which deprive the previous *owner* of his title as by purchase in market overt; (*c*) by accession, as in the case of the young of a domestic animal; (*d*) by confusion of substances.

Post, p. 71.

(2) Irrespective of any previous title, *e.g.* (*a*) under exercise of sovereign authority, as in the case of goods which, pending litigation, are sold by order of the Ct.[1]; (*b*) by occupancy—*i.e.*, original taking possession—of ownerless things. Occupancy of things which are not ownerless, *e.g.*, lost goods, makes the occupant merely *possessor* and not owner.

For wild animals, see *post*, p. 19.

Possession is a question of fact and is acquired when sole physical control has been effectively gained[2] with intent to exclude the world at large. When acquired it is not lost so long as the power of *resuming* physical control remains.

Ownership without possession may exist—

(1) Where the owner has lost possession involuntarily, as where he loses goods or they are taken from him. In such cases he may sue either for the return of the goods or their value or else for damages for their wrongful conversion. To succeed he must show the same cause of action as would have enabled him to maintain *trover*, *i.e.*, a right to immediate possession and a wrongful conversion: proof of *ownership* alone without the right to possess is insufficient, but a mere finder or taker, having the right to possession as against all except the owner, can maintain trover.

If goods are feloniously obtained from the owner he cannot bring any civil action against the felon until the latter has been prosecuted criminally.[3] He may retake the goods, but it is a misdemeanour to receive them back on an agreement not to prosecute.

(2) In case of **bailment**, *i.e.*, delivery of goods on a condi-

[1] R. S. C., Order L., r. 2.

[2] See *Young* v. *Hichens*, 6 Q. B. 606.

[3] *Appleby* v. *Franklin*, 17 Q. B. D. 95; *Midland Insurance Co.* v. *Smith*, 6 Q. B. D. 569.

tion that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they were bailed shall be answered.[1] In all cases of bailment the *property* remains in the bailor and only *possession* passes to the bailee. If it be a *simple bailment*, *i.e.*, one which does not give the bailee a right to exclude the bailor, as where goods are lent or are in the hands of a warehouseman or carrier, *either* bailor *or* bailee may maintain trover. But if the bailee has such a right, as where goods are pawned or let for hire, then he only can maintain trover. If, however, any bailee converts the goods to his own use, *e.g.*, if a hirer wrongfully sells them, the bailment is determined and the right to possession vests in the bailor, who may maintain trover against the bailee or any third person.

At C. L. the bailee alone had the right of action and was therefore responsible for the safe return of the goods, though taken from him or lost by him without his fault, unless he was deprived of them by the act of God or the King's enemies, but for damage or destruction of the goods while in his possession he was not liable without negligence.

By modern law a bailee, in the absence of *negligence*, is not as a rule liable for the failure to return goods taken from or lost by him.[2] **Innkeepers** and **carriers** are by C. L. absolutely responsible for loss unless caused by the act of God or the King's enemies, or by the negligence of their customer or the inherent vice of the thing carried. Their liability has, however, been limited by the Innkeepers Act, 1863, the Carriers Act, 1830, the Railway and Canal Traffic Act, 1854, and various statutes relating to carriers by water. The responsibility of a bailee for damage to goods while in his possession is generally governed by the same principles.

If goods in possession of a bailee are destroyed or injured by a stranger the bailee—whether responsible to the bailor or not—can sue the stranger.[3] If the bailment were

[1] *R.* v. *Macdonald*, 15 Q. B. D. 323.

[2] *The Winkfield*, 1902, P. 42.

[3] See *Cogge* v. *Bernard*, 1 Smith, L. C.; *The Winkfield*, 1902, P. 42 the bailee must account to the bailor for the value so recovered).

determinable at will either bailor or bailee may sue; if it were such as to give the bailee a right to exclude the bailor the bailee may sue, but the bailor may also sue for any permanent damage done to his property in the goods.

Lien is the right of a person in possession of goods to retain them until a debt due to him is paid. It may be (*a*) *particular*, *i.e.*, a right to retain the goods out of which the debt arose; (*b*) *general*, *i.e.*, a right to retain in respect of a general balance of account. A particular lien is given by C. L. over goods which a person is compelled to receive as in case of carriers and innkeepers, also to any person who has by labour or skill improved an article entrusted to him.

A general lien arises by (1) express contract; (2) contract implied by the course of dealing between the parties; (3) the custom of some trade, business, place or market.

Solicitors have a lien on all documents of their clients for their *professional* charges, but on title deeds the lien can only be co-extensive with the client's interest, thus if the client be a life tenant or mortgagee the solicitor cannot retain the deeds against the remainderman or mortgagor.

A lien is merely a right to retain possession, which is sufficient to support an action of trover, but gives no authority to sell the goods, except in the case of innkeepers,[1] or charge for their keep. It is lost if possession is given up or security is taken for the debt under circumstances showing an intention to abandon the lien.

On a distress for rent the *property* in the goods seized remains in the owner until they are sold.

In all these cases therefore of taking or finding goods, bailment, lien, and distress the property in goods is in one person, though the right to possess may be in another and possibly possession in a third.

[1] Innkeepers Act, 1878 s. 1

CHAPTER III.

OF THE ALIENATION OF CHOSES IN POSSESSION.

At C. L. the transfer of chattels might be effected with or without writing, but was invalid without delivery of possession. At present they may be transferred (1) by delivery of possession with intent to pass the ownership; (2) by deed; (3) by a *contract* of sale.

Possession may be delivered (1) by actual physical transfer of the goods or the means of access to the goods, *e.g.*, the key of the place where they are stored; (2) **constructively,** as where a seller changes the nature of his possession by agreeing to hold goods as bailee for the buyer.[1]

A **gift** of personal chattels may be effected (1) by actual delivery of possession,[2] in which case no deed or writing is necessary, nor need there be any consideration; (2) by *deed* when actual delivery is not necessary.

If goods are already in the possession of the intended donee a constructive delivery takes place when he ceases to hold as bailee and, with the donor's consent, begins to hold on his own account.[3]

If the goods are in the custody of a *simple* bailee a constructive delivery by the bailor to a third person may be effected by the agreement of all parties that the bailee shall hold the goods for the transferee.

Where goods are at sea indorsement and delivery of the bill of lading is equivalent to delivery of the goods.

On a **loan for consumption** the *ownership* of the goods passes on delivery of possession and the lender has merely the right to enforce restoration of the same quantity.

[1] *Elmore* v. *Stone*, 1 Taunt. 458. It is doubtful whether a verbal *gift* can be effected by constructive delivery in this way.

[2] *Irons* v. *Smallpiece*, 2 B. & Ald. 551; *Cochrane* v. *Moore*, 25 Q. B. D. 75.

[3] *Kilpin* v. *Ratley*, 1892, 1 Q. B. 582.

A grant of chattels by deed is irrevocable though made without consideration. By the Bills of Sale Acts, 1878[1] and 1882,[2] any *absolute* assignment of chattels in writing[3] not followed by delivery of possession within seven days must be attested and registered in accordance with the Acts, otherwise—unless it is an assignment for creditors on a marriage settlement—it will be void against the assignor's *creditors* with regard to such of the chattels as remain in the assignor's apparent possession, and may be defeated by a subsequent assignment duly registered. Assignments by deed by way of security for the payment of money are *altogether* void unless made and registered in accordance with the Act of 1882.

Sale.—When a contract has been made for the sale of lands the legal estate remains in the vendor until transferred to the purchaser by a deed of conveyance. But in case of a contract for the sale of chattels personal the property may pass *by the contract* without further formality either at once or upon the fulfilment of some condition. A *contract of sale* of goods may be (1) a **sale**—where the property is transferred at once, or (2) an **agreement to sell**—where the transfer of the property is to take place at a future time or on the fulfilment of some condition. When the time elapses or the conditions are fulfilled it becomes a sale.

Sale of Goods Act, 1893, s. 1.

The law relating to the effect of a contract of sale in passing the property is now codified by the Sale of Goods Act, 1893.[4]

Mortgages of goods.—There is a **pledge** of goods when *possession* of them is transferred to a creditor as security for a loan. There is a **mortgage** when the property in them is transferred, subject to the right of the borrower

[1] Ss. 4, 8.

[2] S. 10.

[3] This includes a contract for the sale of goods which is enforceable merely by a memorandum in writing under s. 4 of the Sale of Goods Act, 1893. But the Bills of Sale Acts do not apply to transfers of goods in the ordinary course of business of any trade or calling (1878, s. 4).

[4] Ss. 16—19. For these sections and for the law relating to the sale of goods, see A. C. T., Part iii., Chap. I.

to retain possession until default in payment and to redeem the goods by payment of the debt within the time specified.

At C. L. a mortgage may be made without deed, but now all *written instruments* creating mortgages of goods must be executed in accordance with the Bills of Sale Acts, 1878 and 1882.

By the latter Act all bills of sale of personal chattels given *as a security for the payment of money*[1] are void unless made and registered in accordance with the required forms. If the consideration is less than £30 they are also void. But the Acts do not apply to documents accompanying transactions in which the possession is passed, as in the case of a pledge.[2] Ss. 8, 9. S. 12.

A **transfer in equity** of property in chattels may take place either (1) by the creation of a **trust** by A., the legal and beneficial owner, in favour of B.; (2) by A., the owner of an equitable interest, assigning his interest to B. A trust of chattels may be created by word of mouth, and is valid without any transfer of possession or valuable consideration. But an incomplete transfer intended as a gift will not be enforced in equity as a trust.[1] By the St. Frauds all *assignments* of *any* trust must be in writing signed by the assignor, or by his will. All written declarations of trusts of chattels made without transfer and all written agreements by which a right in equity to any personal chattels is conferred are within the Bills of Sale Acts,[3] unless made for the benefit of creditors generally or as a marriage settlement. S. 9.

Future Goods.—A man cannot assign chattels which he merely expects or hopes to acquire in the future, but he may *contract* to assign after-acquired goods, and any agreements purporting to be an assignment of future goods can only operate as a contract to assign them when acquired; no *legal* ownership will pass until the assign-

[1] *Richards* v. *Delbridge*, L. R. 18 Eq. 1.

[2] *Ex parte Hubbard*, 17 Q. B. D. 690; *Charlesworth* v. *Mills*, 1892, A. C. 231.

[3] *I.e.*, either as absolute bills of sale (as to which see p. 10), or as bills of sale given as security.

ment is actually made, but the *equitable* interest will pass to the assignee as soon as the goods are acquired by the assignor.[1]

Ss. 5, 6. Under the Bills of Sale Act, 1882, written assignments of future goods by way of security are with certain exceptions void except against the grantor.

Personal Incapacity.—An alien was formerly subject to disabilities, but under the Naturalization Act, 1870, is on the same footing as a natural born British subject save in respect of owning a ship.

At C. L. the gift or conveyance of an infant is in general *voidable*, but under the Infants' Relief Act, 1874, an infant's conveyance by mortgage or to secure money lent to him is *void*.

Conveyances or assignments by a lunatic or idiot are *void* if voluntary, but if for valuable consideration are *voidable* only if the other party knew of his condition. A convict or person against whom sentence of death has been pronounced or recorded cannot, except while lawfully at large under any licence, contract, or alienate, or charge his property. During his disability an administrator of his property may be appointed.

Alienation for Debt.—As a rule the contracting of a debt merely gives the creditor the right to sue the debtor personally. Before judgment the claim cannot be satisfied out of the debtor's property.

But in some cases chattels may be seized and sold without a judgment, *e.g.*—

R. P., Chaps. XII., XV.

(*a*) Where they are distrained and sold by a landlord to satisfy his claim for rent or by a person entitled to an annual sum charged on land.

(*b*) Where they are seized and sold to satisfy Crown debts.

(*c*) Where they are distrained and sold to satisfy taxes or rates, or by a justice's warrant under the Summary Jurisdiction Acts.

Except in the above cases chattels can be seized in

[1] *Holroyd* v. *Marshall*, 10 H. L. C. 191; *Joseph* v. *Lyons*, 15 Q. B. D. 280.

the owner's lifetime only in execution of a judgment or upon his bankruptcy.

If judgment is obtained in the High Court for a sum of money the debtor's goods may be seized under a writ of *fieri facias*, which directs the sheriff to cause the amount of the debt to be realized by a sale of the debtor's goods and chattels. By the Sale of Goods Act, 1893, a writ of *fi. fa.* binds the property in the goods only from the time it is delivered to the sheriff, and, even after it is delivered, a purchaser in good faith and for valuable consideration without knowledge of its delivery acquires a good title.

Post, Chap. VII.

S. 26.

Chattels may also be seized and sold in execution of judgments of inferior courts, *e.g.*, County Courts.

The seizure of goods in execution is, if the goods are sold or retained by the sheriff for twenty-one days, an *act of bankruptcy*. But the execution is not thereby avoided and a purchaser has a good title against the trustee in bankruptcy.[1] Wearing apparel, bedding, and tools and implements of trade to the value of £5 in all are protected from seizure under an execution.[2]

Bankruptcy Act, 1890, ss. 1, 46.

If the debtor has merely an equitable interest in goods and the ordinary modes of execution are impossible, the same result is obtained by **equitable execution,** *i.e.*, the appointment by the Ct. of a *receiver* of the debtor's interest.

Death.—On the death of a person his chattels have always been liable for his debts. A creditor may (1) sue the executor or administrator and obtain execution out of the goods of the deceased; (2) apply for the administration of his estate in the Ch. D.; (3) take proceedings to have the estate administered in bankruptcy.

If a deceased debtor's goods are distributed by his P. R. without payment of debts the creditors may follow the goods in the hands of all persons who have not acquired them for valuable consideration and without notice.

[1] A creditor cannot, however, retain the benefit of an execution against land or goods or attachment of debts, unless it is completed before the date of the receiving order, and before notice of a petition or available act of bankruptcy (1883, s. 45).

[2] 8 & 9 Vict. c. 127, s. 8; 51 & 52 Vict. c. 43, s. 147.

CHAPTER IV.

OF SHIPS.[1]

SHIPS are governed by special rules, now for the most part consolidated in the Merchant Shipping Act, 1894, of which the following are the chief provisions:—

S. 1. A British ship is one owned wholly by (1) natural born British subjects; (2) naturalised persons and denizens who have taken the oath of allegiance and reside or carry on business in British dominions; (3) British corporations having their principal place of business in British dominions.

No alien can be the owner of a British ship. Nor can a natural born subject who has become a subject of a foreign state unless he subsequently takes an oath of allegiance and resides or carries on business in British dominions.

S. 5. The property in a British ship is divided into sixty-four shares and not more than sixty-four persons can be *registered* at one time as owners, but this rule does not affect the beneficial title of any number of persons claiming through or under a registered owner. Any number of persons not exceeding five may be registered as *joint owners* of a ship or share. Joint owners are to be considered as constituting one person only as regards the number of persons entitled to be registered as owners, and cannot dispose in *severalty* of their interest. A corporation may be registered as owner by its corporate name.

S. 56. No notice of any trust can be entered on the register, and the registered owner or mortgagee of a ship or share

S. 57. alone has power to dispose of it. But equitable interests may be enforced against an owner or mortgagee.

Ss. 2, 3. Every British ship—except small vessels—must be registered, whereupon a certificate of registry is given,

S. 15. which is not subject to detention by reason of any charge,

[1] For contracts of affreightment, see A. C. T., Part iii., Chap. V.

lien, or interest claimed by any owner, mortgagee, or other person. Any change occurring in the registered ownership must be indorsed on this certificate. S. 20.

A registered ship or share must be transferred by bill of sale in the prescribed form executed before and attested by a witness or witnesses. The transferee cannot be registered until he has made a declaration that he is qualified to own a British ship. S. 24. S. 25.

All mortgages must be in prescribed form, must be recorded by the registrar in the order of time in which they are produced to him. If there are more mortgages than one they have priority according to the date of *registration*. S. 31. S. 33.

Transfers (which must be in prescribed form) and discharges of mortgages must be duly registered. Ss. 32, 37.

A registered mortgage is not affected by the subsequent bankruptcy of the mortgagor, nor does the doctrine of reputed ownership apply. S. 36. *Post*, p. 30.

For the purposes of sale or mortgage out of the country in which the port of registry is situated the registrar may grant **certificates of sale or mortgage.** Ss. 39—46.

The transmission of the property or of the interest of a mortgagee in a ship or share by any means other than a transfer under the Act, *e.g.*, on death, must be authenticated and registered in accordance with the Act. Ss. 27, 28.

Ships are subject to **maritime** law, according to which certain claims attach upon the ship itself and may be enforced by an action *in rem*, *i.e.*, an action in the Admiralty Division of the High Court under which the ship may be arrested and sold to satisfy the claim. This may occur—

(1) Where a **maritime lien**[1] exists, *i.e.*, where the claim is for (*a*) damages caused by collision due to faulty navigation; (*b*) salvage services; (*c*) wages of and disbursements properly made by the master,[2] and seamen's wages; (*d*) money lent and secured by a **bottomry bond,** *i.e.*, a contract whereby the ship is pledged for the payment, *in the event of the voyage ending successfully,*

[1] See *The Henrich Bjorn*, 10 P. D. 44; 11 A. C. 270.
[2] S. 167.

of money advanced for *necessaries* for the ship and voyage.[1]

As between several competing maritime liens the rule is (*a*) that of liens arising *ex contractu* or *quasi ex contractu* the *last* created in point of time ranks first; (*b*) that liens arising *ex delicto* rank in the order of time in which they were incurred. Maritime liens for collisions rank as between themselves according to the date of the collision. A lien for collision takes precedence of previous mortgages and maritime liens for services previously rendered, but is postponed to liens under a bottomry bond for repairs and to a lien for subsequent salvage. A lien for mariners' wages is preferred to a lien for the master's wages and disbursements. Both these rank before a lien for a subsequent bottomry bond but after a lien for collision.

A maritime lien does not depend upon possession, but attaches on the ship in the hands of any person, even a *bonâ fide* purchaser without notice.

(2) In case of claims for towage and necessaries supplied to a foreign ship or to a ship whose owner is not domiciled in England or Wales elsewhere than in the port to which she belongs. Here there is no maritime lien, and the ship can only be arrested while she is owned by the debtor.

Admiralty Jurisdiction Act, 1840, s. 4.

(3) Claims to the ownership of or title to a ship arising in any cause of possession, salvage, damages, wages, or bottomry.

Admiralty Court Act, 1861, s. 6.

The Court may also decide all questions between co-owners as to the ownership, possession or employment of a ship and settle accounts and direct the ship to be sold or make any order it may think fit.

The Admiralty jurisdiction was formerly in the High Court of Admiralty, but is now by the Judicature Act, 1873, in the Admiralty Division of the High Court. All suits which were commenced by a cause *in rem* or *in personam* are now commenced by an action. Certain County Courts now possess Admiralty jurisdiction. Under

[1] **Respondentia** is a contract of similar nature to bottomry, but entered into with respect to cargo only, and enforceable against the cargo under the Admiralty jurisdiction of the Court.

the Maritime Conventions Act, 1911, proceedings in respect of damages for loss of life or personal injury caused by any ship may be brought in any Ct. of Admiralty either *in rem* or *in personam*.

CHAPTER V.

OF CHATTELS WHICH DESCEND TO THE HEIR.

Part 1., Chap. X.

SOME chattels are so closely connected with land that, contrary to the general rule, they pass with the land whenever it is disposed of, and, subject now to the L. T. A. 1897, pass to the heir. These chattels are—

(1) **Title deeds** which pass on a conveyance or devise of land without being expressly mentioned. Where, however, a vendor retains any part of an estate to which any documents of title relate he has a right to retain such documents.[1] The tenant of an estate in fee simple has an absolute property in the deeds but where lands are held for a limited estate, *e.g.*, for life, the tenant has merely an interest in the deeds co-extensive with his estate and a right to their possession during its continuance. A tenant for a term of years has the property in the deeds relating to the term, but no rights to the deeds relating to the freehold.

(2) **Heirlooms,** strictly so-called, *i.e.*, personal chattels which by a special custom go to the heir and not the P. R. of the owner. The owner can dispose of them during life but not by will if he leaves the land to descend to the heir. (As to other chattels called heirlooms, see p. 55).

Fixtures are such chattels personal as are fixed to the soil or a building. Everything attached to the land was at C. L. considered as part of the land, and houses themselves were and still are regarded as land so as to pass by conveyance of the land without special mention. And a conveyance of a building includes all ordinary fixtures and even trade fixtures unless a contrary intent appears.

C. A. 1881, s. 6.

[1] Vendor and Purchaser Act, 1874, s. 2.

And where fixtures are attached with the concurrence of the mortgagor to mortgaged land or building they become subject to the mortgagee's security.[1]

Chattels temporarily affixed for their more convenient use and not as an improvement to the inheritance are, however, not fixtures.[2]

Tenants for terms of years may now remove before the expiration of their tenancy[3] fixtures set up for *trade, ornament*, or *domestic use*. Moreover, by the **Agricultural Holdings Act, 1908,** a *tenant on an agricultural holding*, as defined by the Act, who affixes any engine, machinery or fixture for which he is not entitled to compensation under the Act or otherwise, and which he was not under any obligation to affix, or did not affix instead of any fixture belonging to the landlord, may remove it before or within a reasonable time after the end of his tenancy, provided that (1) before removal he has paid all his rent and performed all other obligations; (2) he does no avoidable damage; (3) he makes good any damage; (4) he gives one month's notice of intent to remove. The landlord, however, has the right to purchase any such fixture.

S. 21.
S. 48.

A tenant for years can *during the term* sell or mortgage removable fixtures with or without his interest in the land, and they can be seized under a writ of *fi. fa.*, and will pass to his trustee in bankruptcy. A sale of such fixtures is a sale of *goods*, not of an interest in land, and therefore governed by s. 4 of the Sale of Goods Act 1893.[4]

A written assignment of fixtures separately from land is a bill of sale within the Bills of Sale Acts, but—except in the case of trade machinery—not when they are assigned together with any interest in the land.

Bills of Sale Act, 1878, ss. 4, 5.

Fixtures set up by a *life tenant* for trade, ornament, or domestic use, pass to the P. R., but if affixed by a *tenant*

[1] *Hobson* v. *Gorringe*, 1897, 1 Ch. 182. *Reynolds* v. *Ashby*, 1904, A. C. 466; *Ellis* v. *Glover*, 1908, 1 K. B. 388.

[2] *Leigh* v. *Taylor*, 1902, A. C. 157.

[3] See *Thomas* v. *Jennings*, 66 L. J. Q. B. 5

[4] C. T., p. 104.

in fee simple they pass to the devisee or heir.[1] If fixtures are demised to a tenant with the house the property remains in the landlord subject to the tenant's right of possession during the term.

Chattels vegetable, *i.e.*, timber, corn, fruit, &c., pass with the land without express mention if unsevered, but may be excepted or sold apart from the land.[2] If a tenant in fee simple dies without having sold or devised them, then (*a*) emblements, *i.e.*, annual industrial growths, pass to the P. R. but (*b*) natural growths to the heir. Emblements belong also to the P. R. of a tenant and to a tenant at will if dismissed from the farm before harvest. Tenants at a rack rent holding under a landlord who has a limited interest which expires during their tenancy continue to hold until the end of the current year of their tenancy. Part i., Chap. V.

Where land is let to a tenant for years or life the property in the timber,[3] if no exception is made, belongs to the owner of the inheritance subject to the limited rights of enjoyment of the tenant. Part i., Chap. V.

Animals *ferae naturae* are not the subject of property until killed, caught or tamed, and will not pass to the P. R.

The occupier of land has now the sole right of killing and taking game, unless expressly reserved to the landlord or some other person. And under the **Ground Game Act, 1880**, every occupier of land has, subject to certain limitations, the right to kill and take hares and rabbits concurrently with any other person who may be entitled. S. 1, amended by Ground Game Act, 1906, s. 2.

If the landlord has reserved the right of killing game he may authorise any person who has a game licence to enter on the land for the same purpose. Game Act, 1831, s. 11.

[1] *In re Lord Chesterfield's Settled Estates*, 1911, 1 Ch. 237.

[2] Emblements, industrial growing crops, and things attached to or forming part of land are "*goods*" if they are agreed to be severed *before sale or under the contract of sale* (Sale of Goods Act, 1893, s. 62). Growing crops when assigned or charged separately and not with any interest in the land are personal chattels within the Bills of Sale Acts (1878, s. 4).

[3] As to what is timber, see *Duchesne* v. *Magniac*, 1891, 3 Ch. 306.

Property in Game.—The term "property" as applied to game means at C. L. no more than the right to catch, kill, and appropriate it. This right existed (*a*) *ratione soli*, being then the C. L. right of an owner to kill and take all animals *feræ naturæ* found upon his land; (*b*) *ratione privilegii*, being then a right granted by the Crown to kill and take such animals upon the land of another. The C. L. rules as to the property in game killed were, therefore, as follows[1]: (1) If A. starts game in A.'s land and follows it into B.'s land and there kills it, the property is in A. (2) If A. starts and kills it in B.'s land, the property is in B. (3) If A. starts game in the *chase* or *warren* of B., who is therefore entitled to it *ratione privilegii*, and kills it in C.'s land, the property is in B. because the privilege is not changed by the act of a stranger. (4) If A. starts game in the land of B., who is entitled *ratione soli* only, and follows it and kills it in the land of C., it belongs to A., because it was only driven upon C.'s land by A.

S. 36. But by the Game Act, 1831, the property in game killed on any land by strangers vests in the person having the right to kill and take the game upon the land.

CHAPTER VI.

OF CHOSES IN ACTION.

PERSONAL actions were brought to enforce an obligation imposed on the defendant personally to make satisfaction for a wrong or breach of contract. The C. L. satisfaction was damages; hence the right to bring a personal action is a thing valuable in money and in this sense is property. But it differs from ownership in that it is a right against a *particular person* and not against all the world. Personal actions at law are (1) *ex delicto*, based on torts, *i.e.*, violations of a duty imposed by law; (2) *ex contractu*,

[1] *Blades* v. *Higgs*, 11 H. L. C. 621.

based upon violations of an obligation created by agreement.

Formerly actions for damages could be brought only in the Common Law Cts. and equitable remedies could be obtained only in the Cts. of Chancery. But since the Judicature Acts, 1873—1875 (see Part I., Chap. VIII.), each division of the High Ct. can give legal or equitable remedies.

1. **Torts.**—The right of action for a tort is to a limited extent property. The right to sue and the liability to be sued are not, however, always transmissible. At C. L., if either party died, the right of action ceased.[1] To this rule, however, there are the following exceptions:—

1. The personal representatives of the deceased can *sue* for all injuries to his *personal property*.[2] They can sue for injuries to his *real property* committed within six months before his death if the action is brought within twelve months after death.

4 Edw. III. c. 7; 25 Edw. III. c. 5.

3 & 4 Will. IV. c. 42, s. 2.

2. The personal representatives of the deceased can be sued for injuries committed by him within six months before his death, provided action is brought against them within six months after they have commenced to administer. They can also be sued in all cases where property or the proceeds of property have been appropriated by the deceased and added to his estate.

3 & 4 Will. IV c. 42, s. 2.

Phillips v. *Homfray*, 24 Ch. D. 454.

3. By the Fatal Accidents Act, 1846, where the *death* of a person is caused under such circumstances that he could have maintained an action, the wrongdoer is liable to an action for damages for the benefit of the wife, husband, parent and child of the deceased to the extent of any *pecuniary loss* which they have suffered by the death. Action must be brought within twelve months of the death.

Amended by the Fatal Accidents Act, 1908.

On bankruptcy all rights of action for injury to the property of the bankrupt pass to the trustee, but rights of action for injury to the person or reputation, can still be

Bankruptcy Act, 1883, s. 4.

[1] Hence the maxim *actio personalis moritur cum persona*. This maxim, however, was applied only to torts (but see p. 25, n. 2).

[2] See *Twycross* v. *Grant*, 4 C. P. D. 40.

exercised by the bankrupt.[1] Liability in tort is not affected by bankruptcy.

A bare right of action for a tort cannot as a rule be assigned.[2] In the case, however, of a contract of insurance, the insurer who has paid on a loss is *subrogated* to all the rights of the insured, *e.g.*, if A. has insured a ship belonging to C. which is run down by the fault of B.'s ship, A. having paid C. has all C.'s remedies against B. or the ship.

When a person has obtained judgment in tort for damages against another person he has no longer a bare right of action but a judgment debt which is enforceable by his own and against the debtor's P. R. and assignable.

2. **Contracts.**—A contract is an agreement or promise creating a legal *obligation*.

An agreement in this sense is the *expression* by two or more parties of their consent, that something shall be done by some or one of them for the use of the other or others.

In order to create an obligation—

(i.) The parties must have capacity to contract.

(ii.) The contract must in some cases be made or evidenced in a particular form or manner.

(iii) There must, unless the contract is by deed, be valuable consideration for the promise.

(iv.) The consent of the parties must not be impeachable on the ground of mistake, misrepresentation, fraud, duress, or undue influence.

(v.) The object of the contract must be lawful.

If one of these requirements fails the agreement will be either void or voidable or unenforceable by action.

Rights and liabilities under contracts.—A contract gives rights to and imposes liabilities only upon the parties to it. Such rights and liabilities may, however, be *assigned*. Liabilities can be assigned only by novation. The right to the *performance* of a contract is, however, a chose in action which can in general be assigned, unless

Ante, p. 4.

[1] *Rose* v. *Buckett*, 1901, 2 K. B. 449.

[2] But the possible *fruits* of an action amount to a future interest in *property*, which can be assigned (*Glegg* v. *Bromley*, 1912, 3 K. B. 474).

the contract is of a personal character.[1] The *breach* of a contract to pay a liquidated sum of *money* gives rise to a *debt*, which is assignable; but a bare right of action for unliquidated damages for breach of contract cannot be assigned. On the death of a contracting party the rights of action[2] pass to and against his personal representatives, and on his bankruptcy to the trustee.

Bills of Exchange and Promissory Notes are simple contracts in writing to pay money and were assignable, the first by the Law Merchant, the latter under a statute of Anne by mere transfer after indorsement. They are now governed by the Bills of Exchange Act, 1882. Their assignment differs from that of ordinary choses in action owing to the fact that they are **negotiable instruments.** Their *assignment* is *not subject to equities*, so that the *property* in them will pass to a *holder in due course*, in spite of any defect in the title of the person from whom he took it. Nor need any notice of assignment be given to the debtor.[3] A few other instruments, such as foreign bonds and bearer debentures, also possess this characteristic of negotiability.

Bankruptcy Act, 1883, s. 4.

Bills of Exchange Act, 1882, ss. 29, 38.

Post, Chap. VIII.

The C. L. remedies for breach of contract are:

(1) In case of debt an action to recover the amount.

(2) Where the return of a specific thing is claimed an action of detinue. *Ante*, p. 2.

(3) In all other cases an action for damages.

In some cases of executory contracts there is also the *equitable* remedy of **specific performance.**

Damages may be *liquidated*, *i.e.*, agreed on beforehand between the parties and may then be recovered in full provided they really form an estimate of the probable damage and do not merely amount to a penalty. Whether a sum fixed is a penalty or liquidated damages does not depend upon what it is called by the agreement, but on the

[1] *Kemp* v. *Baerselman*, 1906, 2 K. B. 604.

[2] An action for breach of promise does not survive against the personal representatives of the deceased except to the extent of any *special damage*, *i.e.*, damage to property or loss of money through the breach (*Finlay* v. *Chirney*, 20 Q. B. D. 494).

[3] As to negotiable instruments generally, see A. C. T., Part iii., Chap. II.

circumstances of the case. Generally speaking if A agrees to pay (1) a certain sum on failure to pay a *smaller* sum, or (2) a sum so excessive that it *cannot* represent the actual damage, or (3) the same sum for a breach of any one out of several conditions of unequal value, the sum will be considered as a penalty and only the actual damages will be payable.[1]

CHAPTER VII.

OF DEBTS[2] AND BANKRUPTCY.

1. OF DEBTS.

Debts of record are debts due by the evidence of a Court of record. They include:

(*a*) *Judgment debts*, *i.e.*, debts due by the *judgment* of a Court of record.

A judgment creditor might formerly have imprisoned his debtor by a writ of *capias ad satisfaciendum*, but now by
S. 4. the **Debtors' Act, 1869,** no person can be arrested or imprisoned for making default in payment of money except in the six cases therein specified.[3]

But by s. 5 a person may be committed for not more than six weeks *or* until payment, if, *having means to pay*, he refuses or neglects to pay any debt due in pursuance of the order or judgment of a Court. Such an imprisonment does not, however, satisfy the debt or deprive the creditor of his right to issue execution, it is a punishment.
S. 103. By the Bankruptcy Act, 1883, the Ct. instead of committing a judgment debtor may with the consent of the creditor make a receiving order against the debtor.

Judgment may be given against a defendant by his consent. In this case a judge's order is obtained by consent authorizing the plaintiff to enter up judgment and to

[1] *Wallis* v. *Smith*, 21 Ch. D. 243; *Kemble* v. *Farren*, 6 Bing. 141.
[2] See further A. C. T., Part I., Chap. II.
[3] As to the remedies of a judgment creditor against the real estate of his debtor, see Part I., Chap. XII.

(A.) In bankruptcy and in the administration *in bankruptcy* of the insolvent estates of deceased persons (Bankruptcy Act, 1883, ss. 40, 125; Preferential Payments in Bankruptcy Act, 1888; and Bankruptcy Act, 1913).

1. Debts due to a registered friendly society from its officer for money of the society in his possession.

2. (*a*) All parochial or other local rates due from the bankrupt or the deceased at the date of the receiving order or his death, and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, property or income tax assessed on the bankrupt or the deceased up to the 5th of April next before the date of the receiving order or his death, and not exceeding in the whole one year's assessment.

(*b*) All wages or salary of any clerk or servant in respect of services rendered to the bankrupt or the deceased during four months before the date of the receiving order or his death, not exceeding £50.

(*c*) All wages of any labourer or workman not exceeding £25, whether payable for time or for piece work, in respect of services rendered to the bankrupt or the deceased during two months before the date of the receiving order or his death: provided that where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority in respect of the whole of such sum, or a part thereof, as the Court may decide to be due under the contract, proportionate to the time of service up to the date of the receiving order or the death, as the case may be.

(*d*) In the bankruptcy only (as it seems) of an employer, all amounts, not exceeding in any individual case £100, due in respect of any compensation payable under the Workmen's Compensation Act, 1906, the liability therefor accrued before the date of the receiving order.

The debts specified under (2) rank equally as between themselves, and are to be paid in full, unless the property of the bankrupt or the deceased is insufficient to meet them, in which case they are to abate in equal proportions between themselves. They are also to be discharged forthwith, so far as the property is sufficient to meet them; Pref. Payments Act, 1888.

3. All other debts proved *pari passu*: except that

4. Nothing is recoverable in respect of a loan to a person engaged or about to engage in any business on a contract that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits of the business, or in respect of the share of the profits contracted for by the seller of the goodwill of a business in consideration of a share of the profits, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied; Partnership Act, 1890, s. 3.

5. The claim of a wife for any money or property lent or entrusted to her husband is postponed until all his other creditors for valuable consideration have been satisfied; M. W. P. A., 1882, s. 3. On the bankruptcy of a wife any claim by her husband in respect of loans, etc., *for the purposes of his trade or business* are similarly postponed; B. A., 1913, s. 12.

A landlord may only distrain after the commencement of a bankruptcy, or an order for administration in bankruptcy of a deceased person's estate, for six months' rent due prior to the date of the order of adjudication, or order for administration; and if a landlord distrain on the goods of a bankrupt within three months before that date, the debts specified under (2), above, will be a first charge on the goods so distrained on; B. A. 1883, s. 42; 1890, s. 28; 1913, s. 18. The executor or administrator does not lose the right of retainer of his own debt if an order be made for the administration in bankruptcy of the deceased's estate: *Re Rhoades*, 1899, 2 Q. B. 347.

A secured creditor (*i.e.*, a person holding a mortgage, charge, or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor) may either

(1) rely on his security, and not prove for any debt, or

(2) realise his security, and prove for any balance of his debt remaining unsatisfied, or

(3) surrender his security, and prove for his whole debt, or

(4) set a value on his security, and receive dividends on the balance of his debt; B. A., 1883, s. 168, and second schedule, rules 9—17.

(B.) In the administration of deceased persons' estates by their executors or administrators *out of Court*.

1. Crown debts by *record or specialty*.
2. Debts to which priority is given by particular statutes, *e.g.*, 17 Geo. II., c. 38, s. 3; 59 & 60 Vict. c. 25, s. 35; 56 Vict. c. 5, s. 2.
3. Judgments obtained against the deceased.
4. Recognizances and statutes.
5. Judgments recovered against the executor or administrator on special or simple contract liabilities.
6. Other debts incurred for value, whether by special or simple contract, but subject to the Crown's priority over other simple contract creditors.
7. Debts in respect of loans under s. 3 of the Partnership Act, 1890.
8. Wife's claims under s. 3 of the Married Women's Property Act, 1882.
9. Voluntary bonds and covenants; *ante*.

An executor or administrator may prefer one creditor to another of equal degree, and may retain a debt due to himself from the deceased out of legal assets in preference to all other debts of the same degree. A landlord may distrain for rent due to him from the deceased as far back as one year from the making of the distress, if the tenancy were within the Agricultural Holdings Act, 1908, and six years from the time of the distress in other cases; 3 & 4 Will. IV. c. 27, s. 42; see *Re Fryman's Estate*, 38 Ch. D. 468.

(C.) In the administration of the insolvent estates of deceased persons in *the Chancery Division*.

1. Crown debts by record or specialty.
2. The other debts according to the bankruptcy rules, but subject to the executor's or administrator's right of retainer of his own debt in preference to others of equal degree (*Re Ambler*, 1905, 1 Ch. 697), and to the Crown's priority over other simple contract creditors.

Secured creditors are governed by the same rules as prevail in bankruptcy.

The above priorities in (B) and (C) apply only to *legal* assets. Out of equitable assets all debts are payable *pari passu*, subject only to the priority of the Crown or priorities given by special statutes.

[*To face Part II.*, *p.* 25.

issue execution, according to the terms of the order. The order is void unless filed in the Central Office within twenty-one days.

(*b*) *Recognisances*, *i.e.*, obligations entered into before a Ct. of record or magistrate duly authorized and conditioned to become effective if the person bound fails to do some act as, *e.g.*, where a person is bound over in the sum of £50 to keep the peace.

Specialty debts formerly had priority over all debts by simple contract except money owing for arrears of rent. But by **Hinde Palmer's Act, 1869,** in the administration of a deceased debtor's estate specialty and simple contract debts are of the same degree.[1]

A bond is an instrument under seal whereby one person binds himself to another for the payment of a sum of money or the performance of some act. A bond usually has a condition annexed to it that, on the person bound paying the sum of money or doing the act specified, it shall be void. Thus a common money bond would bind A. to pay £1,000 to B. subject to a condition that if A. paid £500 within three months the bond should be void, the object being to secure prompt payment of the £500. Formerly, if the debt was not paid punctually, the whole penalty was recoverable, but now by 4 & 5 *Anne*, *c.* 16 (following the rules of Equity), payment of the lesser sum with interest and costs is a satisfaction of the bond.

Where a bond was given for securing performance of any other act the whole penalty became due at C. L. on breach of any part of the condition, though relief might be obtained in Equity. Later the obligee was required to state or *assign* the breaches, and though he obtained judgment for the full amount of the penalty he could only issue execution for the damages in respect of such breaches.

At C. L. **interest** on a debt was not recoverable except (1) under an express agreement to pay it; (2) under an agreement implied from the course of dealing between

[1] The accompanying table shows the order of payment of debts in bankruptcy and in the administration of a deceased debtor's estate.

the parties or a trade usage; (3) where the debt was secured by a bill of exchange or negotiable instrument. By the **Civil Procedure Act, 1833,** interest is recoverable on all debts (1) if payable by virtue of a written instrument at a certain time, from the time when payable; (2) if otherwise from the time when a written demand of payment has been made, giving notice that interest will be charged from the date of demand.

J. A. 1838, s. 17.

A *judgment debt* carries interest at 4 per cent. Debts could not formerly be taken in execution. But under the J. A. 1838, the sheriff may seize cheques, bills, bonds or other securities. And, under the C. L. P. Acts, 1854 and 1860, the Ct. may order debts owing or accruing to a debtor to be attached to satisfy a judgment. Such an order may, on the application of a judgment creditor or his assignee, be made on any person within the jurisdiction who is indebted to the judgment debtor. Such person—termed the *garnishee*—may be ordered to appear to show cause why he should not pay to the judgment creditor the debt or sufficient to satisfy the judgment. This order is termed a **garnishee order** *nisi*; when served on the garnishee it binds the debt in his hands, and execution may issue against him if he fails to pay the sum into Ct. and does not appear or dispute his liability. The order for execution is termed a **garnishee order** *absolute*.[1]

s. 12.

1854, ss. 60, 61.

1860, ss. 28—31.

Where a garnishee order is impossible the Ct. may appoint a **receiver** of debts due to the bankrupt. If the debtor has money in Ct. standing to his credit, a **charging order** may be made.

Discharge of a debt may take place[2]—

1. By *payment by the debtor* or his representative to the creditor or his representative. *Tender* of a debt does not discharge the debt but may be a *defence against an action* by the creditor.

2. By *accord and satisfaction*, *i.e.*, by the creditor's acceptance of some other valuable consideration instead of payment. Payment of a sum smaller than the debt

[1] R. S. C., Orders XLII., r. 32, XLV.

[2] See further A. C. T., Part i., Chap. VIII.

is not a discharge unless the creditor gains some additional advantage such as the payment before the debt is due or the concurrence of other creditors in accepting a *composition*.

3. By *set-off*. If A. owes B. £50, and B. owes A. £30, A. may, if sued by B., set off the debt of £30 as a *defence to the action*. But a debt is *discharged* by the set-off of a counter-debt only (i.) in the case of current accounts; (ii.) in administration in bankruptcy and the winding up of companies; (iii.) in administration by the Ct. of the insolvent estates of deceased persons. In these cases only the balance is recoverable.[1]

4. By a *release* under seal or for consideration. A bill of exchange or note may, however, be discharged by a *written* renunciation or by delivering it up to the acceptor or maker. Bills of Exchange Act, 1882, s. 9.

5. By an order of *discharge in bankruptcy* or by a composition under the Bankruptcy Acts. *Post*, p. 28.

6. By the *St. Limitations* the *right of action* may be lost, subject to the possibility of renewal. Chap. XIV.

Compositions.—An insolvent debtor may, apart from the Bankruptcy Acts, make a binding **composition** with some or all of his creditors by which they agree to accept a certain proportion of the debts due to them, and to allow time for payment. Sometimes in this case a **letter of licence** is given by the creditors, in which they covenant not to take proceedings in the meantime, and is embodied in a **deed of inspectorship**, by which inspectors are appointed to watch the winding up of the debtor's affairs. In some cases an assignment of the debtor's property is made to trustees for his creditors; this, however, is an act of bankruptcy, though, subject to s. 31 of the Bankruptcy Act, 1913, it cannot be taken advantage of as such by a creditor who has concurred in it. *Post*, p. 28.

Any **deed of arrangement** is now subject to the **Deeds of Arrangement Act, 1887**, and the **Bankruptcy Act, 1913**. The expression includes any of the following instruments 1887, s. 4; 1913, s. 37.

[1] Bankruptcy Act, 1883, s. 38; Judicature Act, 1875, s. 10; Companies (Consolidation) Act, 1908, s. 207.

made for the benefit of creditors generally, or, in case of an insolvent debtor, for the benefit of three or more creditors: (i.) any assignment of property; (ii.) any deed of or agreement for a composition; (iii.) a deed of inspectorship or letter of licence; (iv.) any agreement or instrument entered into for the purpose of carrying on or winding up a debtor's business with a view to the payment of his debts.

1887, ss. 5, 6. A deed of arrangement is void unless registered in the Central Office of the Supreme Court within seven days after its execution and stamped in accordance with the Acts. It will also be void unless within the time allowed by 1913, s. 23. the Acts it has received the assent of a majority in number and value of the creditors.

1913, s. 31. No creditor on whom a notice of a deed of arrangement has been served in prescribed manner can, after one month from the service of the notice, unless the deed becomes void, present a bankruptcy petition against the debtor founded upon the execution of the deed or the proceedings preliminary thereto. But where a deed of arrangement has become void, the fact that a creditor has assented to it will not prevent him from taking advantage of it as an act of bankruptcy.

2. Of Bankruptcy.

The law relating to bankruptcy is now governed chiefly by the **Bankruptcy Acts, 1883, 1890 and 1913.** When a *debtor*[1] has committed an *act of bankruptcy*[2] a *petition* may, subject to the Acts,[3] be presented either by the debtor or a creditor. The Ct. may then make a *receiving order*, upon which an official receiver is constituted receiver of the debtor's property, and thereafter no creditor whose debt is provable in bankruptcy can take any legal proceedings without leave of the Ct.; a secured creditor 1883, s. 9. may, however, still realize his security.

1890, s. 3. The debtor may still avoid bankruptcy by making, in

[1] Act of 1913, s. 8.
[2] Act of 1883, s. 4.
[3] *Ibid.*, s. 6; 1913, s. 9.

accordance with the provisions of the Act, a *composition* or *scheme of arrangement* with his creditors.[1]

If the debtor is adjudged bankrupt the whole of his realty or personalty becomes divisible among his creditors and vests first in the official receiver and then in a *trustee* or *trustees* appointed by the creditors.[2] It is then administered by the trustee under the control of a *committee of inspection* elected by the creditors, but subject to the supervision of the Board of Trade. The trustee, subject to any special directions of the committee of inspection or of the creditors, has power to sell and generally deal with any property of the bankrupt.[3] 1883, ss. 50, 56, 57.

The **property divisible** does not include (1) property held by the bankrupt on trust for any other person; (2) tools, clothes and bedding to the value of £20 in all. It does include (1) all property belonging to him at the commencement of the bankruptcy or acquired before his discharge[4]; (2) the capacity of exercising all powers over property that might be exercised by him for his own benefit, except the right of nomination to an ecclesiastical benefice; (3) all goods[5] which at the commencement of the bankruptcy are in his possession, order or disposition in his trade or business, with the consent of the true

[1] This may also be allowed *after* an adjudication of bankruptcy, and the bankruptcy may be annulled (1883, s. 23). In either case, however, the debtor may be adjudged bankrupt if he makes default in carrying out the composition.

[2] In case of a composition the debtor's property may similarly be vested in a trustee.

[3] The trustee has a right to disclaim any *onerous property*. The disclaimer determines all rights and liabilities of the bankrupt and trustee, but does not otherwise affect the rights or liabilities of any other party. 1883, s. 55. 1891, s. 18.

[4] But by s. 11 of the Act of 1913 all transactions by a bankrupt after his bankruptcy with any person dealing with him *bonâ fide* and for value in respect of after-acquired *realty or personalty* are valid against the trustee before any intervention by him. Provisions are made by the Act for the appropriation to the creditors of a portion of any income, salary or pension enjoyed by the bankrupt.

[5] Not including choses in action except trade debts. Assignments of chattels by absolute bills of sale registered under the Act of 1878 are excepted from this provision, but not those assigned under bills of sale given by way of security for the payment of money (Bills of Sale Acts, 1878, s. 20; 1882, s. 15).

owner, under such circumstances that he is the *reputed owner*.[1]

1883, s. 43. 1890, s. 20. **Relation Back.**—The bankruptcy commences at and the *title of the trustee to the property* of the bankrupt is deemed to relate back to the date of the act of bankruptcy, or, if more than one, to the first committed within three months before the presentation of the petition. Hence a transaction with a bankrupt may be avoided if he has committed an act on which he is made bankrupt within three months.

1883, s. 49. But bankruptcy will not avoid any payment made to or by the bankrupt, or any conveyance or contract for valuable consideration, made or entered into before the receiving order and before the other party has notice of any available

1913, s. 10. act of bankruptcy. And any payment or delivery of property to a person subsequently adjudged bankrupt is a good discharge to the person so paying, &c., if the payment, &c., is made *bonâ fide* or in the ordinary course of business before the receiving order or notice of a *petition*.

The following transactions are, however, *voidable* against the trustee :—

Part i., Chap. XII. 1. Alienations within 13 *Eliz. c.* 5.

2. Any other fraudulent transfer of property, *e.g.*, an assignment of the whole or practically the whole of the debtor's property for a *past* debt.[2]

1883, s. 48. 3. Any conveyance or transfer of property made by an *insolvent* person with a view of giving a *fraudulent preference* to one of his creditors, provided that the bankruptcy takes place on a petition presented within three months after such conveyance or transfer.

1913, s. 14. 4. An assignment of book debts by a *trader* is, with certain exceptions, void against the trustee as regards any book debts not paid at the commencement of the bankruptcy, unless the assignment is registered as an absolute bill of sale.

1883, s. 47. 5. A *settlement* of property which is not made in consideration of marriage, *or* in favour of a purchaser in good faith, *or* is not a settlement on the wife or children of the settlor

[1] *Crawcour* v. *Salter*, 18 Ch. D. 31.
[2] *Ex parte Johnson*, 26 Ch. D. 338.

of property which accrued to him after marriage in right of his wife is void (i.) if he becomes bankrupt within two years; (ii.) if he becomes bankrupt within 10 years unless he was at the time of making the settlement solvent without including the property settled, and his interest in the property passed to the trustee of the settlement at the date of its execution.

But the title of a *bonâ fide* purchaser for value from a beneficiary under a voluntary settlement will not be avoided by the bankruptcy of the settlor.[1]

Covenants made in *consideration of marriage* for the future payment or settlement for the benefit of the settlor's husband, wife or children, of any money or any property in which the settlor had not at the date of the marriage any interest, not being property in right of the settlor's wife or husband, are also void against the trustee if the settlor is adjudged bankrupt, and the covenant has not been executed at the commencement of the bankruptcy. But the beneficiaries may prove in the bankruptcy after all other creditors for valuable consideration have been satisfied. 1913, s. 18.

Any *payment or transfer* made under such a covenant is also void unless *either* (i.) it was made more than two years before the commencement of the bankruptcy; *or* (ii.) at the time of payment, &c., the settlor was solvent without the aid of the money, &c.; *or* (iii.) the covenant related to specific money, &c., expected to come on the death of a particular person named therein, and the payment, &c., was made within three months after the property came into the possession of the settlor.

Discharge.—An order of discharge releases the bankrupt from all debts and liabilities provable[2] in bankruptcy, except (i.) debts due on recognisances or bail bonds, or for offences against revenue statutes, except by consent of 1883, s. 30.

[1] *Re Carter and Kenderdine*, 1897, 2 Ch. 776.

[2] Debts not provable in bankruptcy are (*a*) unliquidated claims arising otherwise than from contract or breach of trust; (*b*) debts contracted after notice of bankruptcy; (*c*) claims which cannot be valued (1883, s. 31).

1890, s. 10.

the Treasury; (ii.) debts or liabilities incurred by, or on which he has obtained forbearance by, fraud to which he was a party; (iii.) liability under a judgment for seduction, or under an affiliation order, or as co-respondent in a matrimonial cause, except to such extent as the Ct. orders.[1]

CHAPTER VIII.

OF PERSONAL ANNUITIES, STOCKS AND SHARES.

A **personal annuity** is an annual payment not charged on real estate. It may however be limited to A. and his heirs, and will then, if A. dies intestate, descend to the heirs.[2] But it is *personal property*, and if A. by will gives all his personal estate to B., the annuity will be included in the bequest. The **public funds** are such portions of the public debt as have been *funded*, or transferred into perpetual annuities payable as interest on the money advanced; **stock** in the funds is a chose in action, consisting in the right to receive such annuities, subject to the right of the Government to redeem at a fixed sum.

The bulk of the National Debt now consists of "*Consols*," *i.e.*, the Consolidated Stock created by the National Debt Act, 1888, and paying 2½ per cent.

S. 9, applied to Consols by the Act of 1888.

The chief incidents of stock in the public funds were fixed by various Acts, consolidated by the National Debt Act, 1870, by which it was expressly declared to be personal estate. The **transfer** of the *legal* title to stock in public funds is effected only by signature of the books at the Bank of England.[3] No trust is recognized by the Bank;

S. 22.

[1] This last exception applies also to compositions and schemes of arrangement (1890, s. 3).

[2] If given to a grantee and the heirs of his body the grantee does not acquire an estate tail, for the annuity is not a tenement within the Statute *De Donis* (Part i., Chap. IV.); but he has merely a fee simple *conditional* on his having issue.

[3] But by the National Debt Act, 1870, stock may be converted into *stock certificates* payable to bearer and transferable by delivery. And by s. 17 of the Finance Act, 1911, any stock transferable in the books

when, however, the stock stands in the name of a trustee, the beneficiary may transfer his *equitable* interest in any manner he pleases.

Where any person had an interest in stock or shares standing in the name of another person he might formerly *put a stop upon it, i.e.*, might prevent its transfer by a writ of *distringas;* for this a *notice in lieu of distringas* is now substituted, which is filed in the Central Office together with an affidavit by the person claiming setting out his interest. An office copy of the affidavit and a sealed duplicate of the notice must be served on the bank or company. The effect of this is merely temporary, and the bank or company cannot, without a subsequent order of the Ct. or a Judge, refuse to permit a transfer or to pay a dividend for more than eight days.[1]

Stock, being a chose in action, could not formerly be sold under a *fi. fa.*, but by the Judgments Acts, 1838 and 1840, a judgment creditor can obtain a **charging order,** charging the debt upon any legal or equitable interest of the debtor's in any government stock, or stock or shares in a public company, and on the interest of dividends; but no proceedings can be taken to enforce the charge for six months. To prevent the debtor from disposing of his interest a charging order *nisi* may in the first instance be made *ex parte*, and will then be made *absolute* unless the debtor, within the time specified in the order, shows cause to the contrary.

The stock of a deceased person devolves on his P. R., and may be transferred by them, notwithstanding any specific bequest thereof, but the Bank is required not to allow any transfer until probate or letters of administration have been registered at the Bank.[2]

Other personal property of similar nature is Indian and Colonial Government Stock and various Municipal Corporation Stocks.

of the Bank under the Act of 1870 may be registered as a stock *transferable by deed* in manner provided by the regulations thereunder.

[1] See R. S. C., Order XLVI.

[2] National Debt Act, 1870, ss. 17, 23.

Joint Stock Companies.—A share in a trading company is a chose in action consisting in right to receive a certain share of its profits, accompanied in some cases by an obligation to make a certain contribution towards its debts.[1]

Corporations are *legal persons* maintaining continuous existence by a perpetual succession of members. They are (*a*) **sole**—composed of one person, as a bishop; (*b*) **aggregate**—composed of a number of persons acting on important occasions by their common seal. They may exist (1) by C. L. as when (*a*) created by letters patent, or (*b*) corporations by prescription; (2) by statute. The individual members of a C. L. corporation are not liable for its debts, but when created by statute a liability may be imposed.

Early in the eighteenth century a number of joint stock companies were formed without charter or statute. These, therefore, were not corporations, but merely large *partnerships* in which each member was liable for all the debts. In the nineteenth century, incorporation by *registration* became possible, but companies formed by letters patent or statute still have special privileges.

In most cases the shares in joint stock companies are personal estate, though in some of the older companies they are real estate.

Since 1845, all joint stock companies incorporated by special statute are governed by the Companies Clauses Act, 1845, save so far as it is excepted by their special Act. Under this Act the capital of the company is divided into shares, which are personal estate. Certificates are issued to shareholders, which are *primâ facie* evidence of their title. Transfer of the shares is by deed, which must be registered. No shareholder can transfer any share not fully paid up until he has paid all calls due on every share held by him. On default of payment of a call the shareholder can be sued for its amount and his shares can be forfeited. A creditor of the company can issue execution against a shareholder only to the amount unpaid on his

Ss. 1, 2.

Ss. 6, 7.

Ss. 11, 12.

Ss. 14, 15.

S. 16.

Ss. 25—27, 29—35.

[1] *Borland* v. *Steel*, 1901, 1 Ch. 280.

shares, and only so far as there is not sufficient property of the company whereon to levy execution. S. 36.

Joint Stock Companies which were not incorporated sometimes obtained special Acts enabling them to sue and be sued in the name of some officer, but such Acts always preserved the individual liability of the members.

By an Act of 1837 which is still in force, the Crown was enabled to grant, by letters patent, charters enabling a company, without being incorporated, to sue and be sued in the name of an officer, and limiting the individual liability of the members.

By Acts of 1844, Joint Stock Companies for trading purposes might be incorporated by *registration* and banking companies by *letters patent*, but under these Acts a shareholder was fully liable to creditors. **Limited liability** was introduced in 1855; the principle was extended by subsequent Acts now consolidated in the Act of 1908.

Under this Act seven or more persons (or, in case of a private company, two or more persons) may, by subscribing a Memorandum of Association and fulfilling the requirements in respect of registration, form an incorporated company with or without limited liability. No partnership of more than 10 persons may be formed for banking, or of more than 20 persons for any other purpose, having for its object the acquisition of gain, unless it is registered under this Act, or is formed under some other Act, or by letters patent, or is a mining company subject to the jurisdiction of the Stannaries. The liability of members may be unlimited, or may be limited by **shares**, *i.e.*, to the amount unpaid on these shares, or by **guarantee**, *i.e.*, an amount guaranteed in case of winding up. S. 2. S. 1. S. 2. S. 3.

The **Memorandum of Association** must (amongst other things) state the name, situation, and objects of the company, and the amount of its capital, if limited by shares, or of the members' liability, if limited by guarantee. It *may*, if the company is limited by shares, and *must*, if it is limited by guarantee or unlimited, be accompanied by **Articles of Association**, signed by the subscribers to the Memorandum. If there are no Articles, or so far as it is Ss. 3, 4, 5. Ss. 10, 11.

not excluded by the Articles, Table A (*i.e.*, the model Articles appended to the Act) will apply.

The Memorandum limits the *powers* of the company, which is incorporated merely for the purpose of carrying out the *objects* expressed in its memorandum. Any transaction not coming within these objects is *ultra vires* the company and void.[1] The Articles are merely the regulations for the *internal* management of the company.

A person becomes a **member** of a company (i.) if he is a subscriber to the Memorandum; (ii.) if he agrees to become
S. 24. a member and in consequence has his name entered on the register of members.

S. 22. **Shares** in companies registered under the Act are personal estate, transferable in the manner provided for by the Articles. Fully paid-up shares may be converted
S. 41. into **stock.** A *certificate* under the seal of the company,
S. 23. specifying any shares or stock held by any member, is
S. 37. *primâ facie* evidence of his title thereto. **Share warrants** to *bearer* may be issued in respect of any fully paid-up shares or stock.

Creditors of a company registered under the Act have no direct remedy against the individual shareholders, but a company, if insolvent and in a few other cases, may be wound up by the Ct. or voluntarily. Both present and past members are then liable to contribute to payment of its debts and liabilities, but only to the extent of any
S. 122. amount unpaid on the shares. And a past member is liable only (*a*) within one year after he has ceased to be a member, and (*b*) only for liabilities existing while he was a member, and (*c*) only if the existing members are unable to satisfy the contributions required.

Equitable interests may exist in shares as in other personal property, but a company is not bound to take
S. 20. notice of any trust and is discharged by the receipt of the registered holder.

An equitable charge on shares may be created by deposit of the share certificate. An equitable mortgagee of shares has, in the absence of an express power of sale, an

[1] *Ashbury Railway Company* v. *Riche*, L. R. 7 H. L. 653.

implied power to sell the shares in default of payment at the time fixed by the mortgage agreement or by subsequent notice.[1]

A debenture is an instrument, usually under the seal of a company, whereby the company charges itself or its property with the repayment of borrowed money. As a rule negotiable instruments cannot be created by deed; by mercantile custom, however, *bearer debentures* have become negotiable instruments.[2]

Debenture stock is a *funded* debt secured usually by a trust deed on the property of the company. Debentures and debenture stock often create a *floating security*, *i.e.*, an equitable charge on the assets of the company for the time being, which permits the company to deal with and dispose of its property in the ordinary course of business, but which, when it has to be enforced, attaches on the *then* existing assets of the company.

Companies Act, 1908, s. 93.

All mortgages and charges created for securing any debentures or amounting to a floating charge must be registered within 21 days, otherwise they are void, as against the liquidator of the company, or any creditor, so far as concerns *the security* created. A floating charge, created within three months before the winding up of a company, is also void, except to the amount of the cash actually paid, and 5 per cent. interest, unless the company was solvent immediately after the making of the charge.

S. 212.

S. 78.

By the Finance Act, 1910, a duly stamped *contract* note must be executed on the sale or purchase of any stock or marketable security of the value of £5 or upwards by any broker or agent, except in transactions in the ordinary course of business between members of stock exchanges in the United Kingdom.

[1] *Deverges* v. *Sandeman*, 1902, 1 Ch. 579.

[2] *Bechuanaland Co.* v. *London, etc. Bank*, 1898, 2 Q. B. 658; *Edelstein* v. *Schuler*, 1902, 2 K. B. 144.

CHAPTER IX.

OF PATENTS, COPYRIGHTS AND TRADE MARKS.

1. OF PATENTS.

A patent is the name given to a grant from the Crown, by letters patent, of the exclusive privilege of making, using, exercising and vending some **new invention.** The grant of letters patent is a prerogative of the Crown, the abuse of which, during the reign of Elizabeth, led to the passing of

21 Jac. I. c. 3. the **Statute of Monopolies.**

This statute declared all grants of monopolies void, except (by s. 6) "letters patent and grants of privilege for the term of 14 years or under . . . of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patent and grants shall not use."

S. 93. This definition is now retained by the Patents Act, 1907, by which the law relating to this subject has been consolidated.

Term.—The term of the patent may be extended by the High Court for a further period of seven, or in exceptional cases, 14 years where the invention is highly meritorious, and the inventor has been inadequately remunerated. A *patent of addition* may be granted in respect of any modification of the original invention. The patent ceases if the patentee fails to pay any prescribed fees at the prescribed times, but may be restored if the failure to pay was due to mistake or inadvertence.

S. 18.

S. 19.

20.

Subject-matter.—A patent can only be granted in respect of a subject-matter that is both *novel and useful*. And it must be a new *manufacture*, a patent cannot be granted for a mere principle.

The invention must never have been used in public within the realm, or previously known to the public within

the realm. But an invention is not deemed to have been anticipated merely through its publication in a specification more than 50 years old, or in a provisional specification not followed by a complete specification, or if the publication was without the knowledge and consent of the inventor and the matter published was obtained from him, and on learning of its publication he promptly obtained protection for his invention. Exhibition at certain industrial and other exhibitions will not prejudice the right of an inventor to obtain a patent provided that he gives notice of his intention to exhibit, and applies for a patent within six months from the opening of the exhibition. S. 41. S. 45.

An application for a patent may be made by any person who claims to be the **true and first inventor**, whether a British subject or not, and whether alone or jointly with any other person; in case of a joint application, the patent may be granted to the applicants jointly. Thus, if A., the inventor, sells his invention to B., a patent cannot be obtained by B. alone, but only jointly with A. If two persons make the same invention, the one who first publishes it by obtaining a patent will be the true and first inventor. A person can obtain a patent for an invention communicated to him from abroad, or seen by him abroad and introduced into the realm, but not for an invention communicated to him by another within the realm. A grant may be made to the personal representatives of a deceased inventor within six months of his death. Ss. 1, 12. S. 43.

Application must be made to the Patent Office which is under the control of the Comptroller-General of Patents, Designs and Trade Marks, who acts under the superintendence of the Board of Trade. The application must be accompanied by either (*a*) a *provisional specification* which must describe the nature of the invention[1] or (*b*) a *complete specification* which must particularly describe the nature of the invention and the manner in which it is to be per- Ss. 62, 63.

[1] A specification may contain more than one claim, and no objection can be taken to a patent on the ground that it contains more than one invention (s. 14).

S. 9. formed. In either case the Comptroller may require suitable drawings to be supplied. The invention described in the provisional and the complete specification must be the same, but a patent is not invalid if the complete specification claims a further or different invention which was novel at the date of the complete specification, and of which the applicant was the true and first inventor. A

S. 42. complete specification, if not left with the application, must be left within six months from its date or such further time not exceeding one month as the Comptroller may allow, otherwise the application will be deemed to be

S. 5. abandoned. The application, with the specifications, is referred to an examiner for report, and the Comptroller can decline to accept the application or require an amendment, or he may refuse to accept the complete specifica-

Ss. 3, 6. tion, subject in all cases to an appeal to the law officer.

S. 93. Where a complete specification has been left, an investigation is made of specifications filed within the preceding 50 years, and if the invention has been already claimed,

Ss. 7, 8. wholly or in part, the applicant may amend his specification.

Acceptance of the complete specification is advertised by the Comptroller and the application, specifications and

S. 11. drawings are open to public inspection. The grant of the patent is delayed for two months, during which time any person may oppose the grant on the grounds of **opposition** set out in the Act. The chief of these are (i.) that the applicant obtained the invention from the opponent; (ii.) that the invention has been claimed in a prior specification not more than 50 years old; (iii.) that the complete specification is defective; (iv.) that the complete specification claims an invention which is different from that described in the provisional specification, and which forms the subject of an application made by the opponent between the dates of the provisional and complete specifications. The Comptroller decides the case, subject to an appeal to the law officer.

The patent, when granted, is **dated** and sealed as of the day of application, but no proceedings can be taken in

respect of an infringement committed before publication of the complete specification. S. 13.

Between the date of the application and the date of sealing the patent, the applicant has a **provisional protection** which enables him to use and publish the invention, but he cannot take any proceedings for infringement until the grant of the patent. S. 4. S. 10.

The applicant or person entitled to the benefit of the patent may at any time, by leave of the Comptroller, **amend** the specification by way of *disclaimer*, *correction*, *or explanation*, but no amendment will be allowed which would make the invention substantially larger or substantially different. An amendment by way of disclaimer may also be allowed *by the Court*, upon such terms as may be just, in any action for infringement or revocation. S. 93. S. 21.

Infringement.—The patent gives the patentee or patentees a monopoly of making, using, and selling the invention, and to do any of these things without a licence from him or them is an infringement. Joint patentees are joint tenants, but, subject to any contrary agreement, each can use the invention for his own profit without accounting to the others, but cannot grant a licence without their consent, and on the death of one his interest devolves on his personal representatives. S. 37.

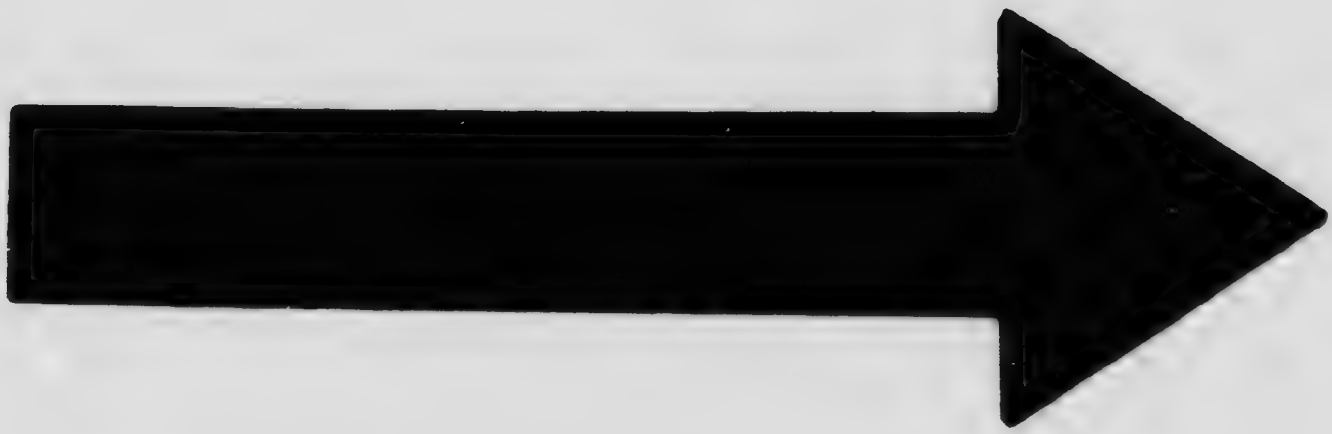
The grant of an exclusive licence does not enable the licensee to sue in his own name for infringement.[1]

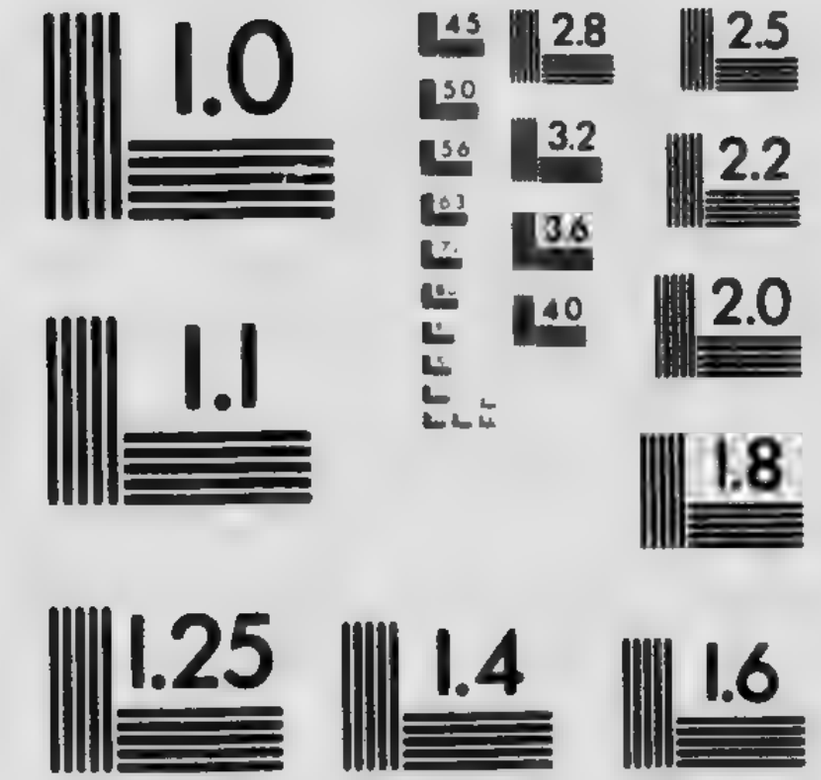
If on a petition presented to the Board of Trade, and referred by the Board to the Court, it appears that the reasonable requirements of the public have not been satisfied, the patentee may be ordered to grant licences or the patent may be revoked. S. 24.

All **assignments** of letters patent must be registered. A *legal* assignment must be by deed, but a valid *equitable* assignment may be made without deed, and may be registered. The assignee is placed in the position of the assignor, and may bring the same actions as might have been brought by him. S. 28.

A Register of Patents is kept at the Patent Office, in which must be entered the names and addresses of grantees

[1] *Heap* v. *Hartley*, 42 Ch. D. 461.





of patents, modifications of assignments, licences and such other matters as may be from time to time prescribed.

S. 28. The register is *prima facie* evidence of such matters, and is open to the inspection of the public. No notice of any

S. 66. trust can be entered on the register, but notice must be entered of the interests of any persons interested as mortgagees, licensees, or otherwise, and any equities in respect of the patent may be enforced in the same way as in respect

S. 71. of any other personal property. An assignee or licensee with notice of a prior unregistered assignment cannot obtain priority of interest by prior registration.

A person who has applied for protection for an *invention, design or trade mark*, in a foreign state with which arrangements have been made for the mutual protection of inventions, and to which the Act has been applied by Order in Council, is entitled to a patent or to registration of his

S. 91. design or trade mark in priority to other applicants.

The **remedy** of a patentee for an infringement is to bring an action (usually in the Chancery Division) claiming an *injunction* to restrain further infringement and *damages*. If he succeeds he may, however, elect between damages and

Ss. 31, 34, 35. an *account of the profits* made by the infringement. Actions for the infringement of patents are now subject to special regulations.

Where any person claiming to be the patentee of an invention threatens any other person with any legal proceedings in respect of any alleged infringement, such person may, if he has not in fact committed any infringement, bring an action claiming an injunction to prevent the continuance of such threats, and may also recover any special damage he has sustained. These provisions do not, however, apply if the person making the threats with due diligence commences and prosecutes an action

S. 36. for infringement.

S. 25. **Revocation** of a patent may be obtained on petition presented to the High Court by (1) the Attorney-General or any person authorized by him; (2) any person alleging (i.) that the patent was obtained in fraud of his rights; (ii.) that he or any person through whom he claims was

the true inventor; (iii.) that he or his predecessor in title in any trade, business or manufacture had publicly used, manufactured or sold the invention before the date of the patent. Any ground showing that the grant was improper, *e.g.*, disagreement between the provisional and complete specification, is also a ground for revocation and a defence to an action for infringement.

Also the Comptroller has jurisdiction, subject to appeal to the Court, to order revocation where four years have elapsed since the date of the patent and the patented article is manufactured exclusively or mainly outside the United Kingdom. S. 27. See also s. 24, *ante*, p. 41.

2. Of Copyright.

Copyright is the exclusive right of multiplying copies of an original work or composition. The law relating to this subject is now entirely[1] regulated by the **Copyright Act, 1911.**

The **subject-matter of copyright** comprises *literary works* (including maps, plans, charts, &c.); *dramatic works* (including original cinematograph productions); *musical works;* and *artistic works* (including works of painting, drawing, sculpture and architecture, and also engravings, prints and photographs). Ss. 1, 3, 5.

The **area of copyright** covers all British dominions, except self-governing dominions which have not adopted the Act or given equivalent statutory rights. Ss. 1, 25, 26.

The **facts which confer copyright** are (1) the work must be original; (2) if a published work it must be first published within the area of copyright, and if an unpublished work the author must at the time of making the work be a British subject or resident within the area of copyright. Ss. 1, 23, 35.

The Act may, however, be applied by an Order in Council (*a*) to works first published in a foreign country as though first published in this country; (*b*) to literary, dramatic, musical and artistic works whose authors were S. 29.

[1] Except as to certain summary remedies for the infringement of musical copyright. (See s. 11 (4)).

foreign subjects, as if they were British subjects; (*c*) to residence in a foreign country as if it were residence in this country. Such order can only be made in respect of a country with which a Copyright Convention exists or which has made reciprocal provisions.

S. 1. **The nature of copyright.**—It means the sole right (*a*) to produce or reproduce, to publish (if unpublished), to perform or, in case of a lecture or address, to deliver in public the work or any substantial part thereof; (*b*) to translate, to turn a dramatic work into a novel or *vice versâ*, and to make mechanical records of literary, dramatic, or musical works; (*c*) to authorize any of the above acts. **Publication** means the issue of copies of a work to the public but does not include performance in public of a dramatic or musical work, delivery in public of a lecture, exhibition in public of an artistic work, construction of an architectural work of art or issue of photographs and engravings of works of sculpture and architectural works of art. For the purposes of the Act (other than those relating to infringement) a work is not deemed published if it is published without the consent of the author or his assigns.

S. 35.

S. 3. The **term of copyright** is:—

1. In general, the life of the author and 50 years after his death. But (*a*) at any time after 25 years, or, in the case of copyright subsisting on December 16th, 1911, 30 years from the death of the author, any person may reproduce a *published* work on giving notice of his intention to do so, and paying to the owner of the copyright a 10 per

S. 4. cent. royalty on all copies sold; (*b*) after the death of the author of a literary, dramatic or musical work which has been published or performed in public, if the owner of the copyright refuses to republish it or to allow republication or performance, a *compulsory licence* may be obtained from the Judicial Committee of the Privy Council, subject to such conditions as may appear fit, on complaint setting forth the refusal, and that by reason thereof the work is withheld from the public.

S 16. 2. In case of **joint authors** the life of the author who dies first and 50 years after his death, or the

life of the author who dies last, whichever is the longer period.

3. In **unpublished works,** until publication and for 50 years after. S. 17.

4. In **works published by or for the Crown or Government departments,** 50 years from publication. S. 18.

5. In **musical records** and **photographs,** 50 years from the making of the original plate or negative. Ss. 19, 21.

The **first ownership** is in the *author* of a work. But, in the absence of any contrary agreement, (i.) the copyright in any engraving, photograph or portrait vests in the person ordering and paying for it; (ii.) the copyright of work done by an employee vests in his employer; where, however, the work is a contribution to a periodical, the author, in the absence of a contrary agreement, can restrain *separate* publication. S. 5.

Assignment.—Any complete or partial assignment must be in writing, signed by the owner or his agent. If the author is the first owner, no assignment or grant of any interest—except in the case of a "collective work," such as an encyclopædia—is operative beyond 25 years from the death of the author; at the end of that time, in spite of any agreement, the reversionary interest vests in his personal representatives. S. 5.

Infringement consists in doing, without the consent of the owner, any act the sole right to do which belongs to the owner. Certain acts are, however, excepted, *e.g.*, (i.) any fair dealing with a work for research, criticism or review; (ii.) making or publishing paintings, photographs, &c., of works of sculpture, &c., permanently situated in any public place; (iii.) publication of newspaper reports, of political speeches delivered at public meetings, or—unless the report is prohibited by notice—of public lectures. Copyright is also infringed by trading in, or importing for sale or hire, any work which, to the knowledge of the person so doing, infringes copyright; and by permitting for private profit the use of any place of entertainment for the performance of a work without the consent of the owner, unless the person so doing did not know, and had Ss. 2, 20, 35.

no reasonable grounds for suspecting, that the performance would be an infringement.

S. 6. **Remedies.**—In case of infringement, the owner of the copyright is, except as otherwise provided, entitled to all such remedies by way of injunction, damages, accounts, and otherwise as are conferred by law for the infringement of a right. But an injunction is the only remedy against a defendant who pleads that he was not aware of the existence of the copyright, and proves that at the date of the infringement he had no reasonable ground for suspecting its existence. The period of limitation for an action for infringement is three years.

S. 8.

S. 9.

Ss. 11—13. The Act also imposes fines on summary conviction for certain offences, and makes provision for the prohibition of the importation of infringing copies.

S. 14.

S. 24. **Existing Copyrights.**—With respect to all works in which copyright or any interest therein existed at the commencement of the Act, copyright as defined by the Act or the same interest therein is substituted for the term given by the Act, commencing from the date when the work was made. But if before the Act the author had assigned the copyright or granted any interest for its whole term, then at the date when the original copyright would have expired, the substituted copyright, in the absence of contrary agreement, passes to the author, but the person who at such date was the owner may either (i.) demand an assignment of the copyright or interest for the balance of the term for such consideration as, failing agreement, may be determined by arbitration; or (ii.) may continue to reproduce the work on payment of a royalty similarly determined, or, if the work is in a collective work of which he is owner, without payment. In the case of musical and dramatic works (i.) where any person was entitled to both copyright and performing right he now gets copyright; (ii.) if entitled to the latter but not the former he gets copyright without the sole right of performance; (iii.) if entitled only to the former he gets the sole right of performance, but no other rights of copyright.

S. 49. **Copyright in Designs.**—By the Patents and Designs Act,

1907, application may be made to the Comptroller-General for registration of any new and original design not previously published in the United Kingdom. From the Comptroller-General there is an appeal to the Board of Trade.

A certificate of registration is granted and the registered proprietor has, subject to the provisions of the Act, copyright for five years, *i.e.*, the exclusive right to apply the design to any article in the *class* of goods in which the design is registered. S. 51. Ss. 53, 54, 58. S. 93.

A register of designs is kept at the Patent Office, and the same provisions are made with respect to entries therein as in the case of the register of patents. Ss. 52, 67.

The registered proprietor may, in case of breach of his right, either sue for a penalty not exceeding £50, or for damages and an injunction S. 60.

3. Of Trade Marks and Trade Names.

Trade Marks.—The right given by law in respect of a trade mark is the exclusive right to use it in connection with certain goods for the purpose of indicating their manufacture or place of manufacture.[1] This right might be acquired by use, but since the Trade Marks Act, 1875, *registration* has been essential to its acquisition.

The law on this subject is now regulated by the **Trade Marks Act, 1905.** By this Act a **register of trade marks,** similar to the register of patents, is kept at the Patent Office. Application for registration must be made in writing to the Comptroller-General, from whom appeal lies to the Board of Trade. Ss. 4—7

A registrable trade mark must contain or consist of the following particulars: (i.) the name of a company, individual or firm; (ii.) the signature of the applicant or a predecessor in business; (iii.) an invented word or words; (iv.) a word or words having no direct reference to the character or quality of the goods, and not being a geographical name or surname; (v.) any other distinctive mark not including, except by order of the Board of Trade S. 9.

[1] *Leather Cloth Co.* v. *American Cloth Co.*, 11 H. L. C. 523.

or the Ct., any name, word or signature other than those
S. 8. specified above. A trade mark can only be registered in respect of particular goods or classes of goods, and no
S. 11. trade mark which is calculated to deceive can be registered.
S. 28. The registration is for 14 years, but may be renewed.
S. 39. Subject to the provisions of the Act the registration of a person as proprietor of a trade mark, if valid, gives him exclusive right to use the trade mark in connection with
S. 41. the goods in respect of which it is registered. But he cannot interfere with the use by any one else of a similar mark in connection with goods for which it had been continuously used before the user of the registered trade
S. 44. mark. And no registration can affect the *bonâ fide* use by a person of his own name, or a *bonâ fide* description of
S. 42. the character and quality of his goods. No person, on the other hand, can prevent or recover damages for an infringement of an unregistered trade mark, unless it was in use before 1875 and registration has been refused.
S. 40. Registration is *primâ facie* evidence of the validity of the registration and subsequent assignments; after seven years it is conclusive unless it was obtained by fraud or was invalid under s. 11.
S. 37. A registered trade mark may be taken off the register on the ground that it was registered without *bonâ fide* intent to use it with such goods, and that there has been no *bonâ fide* user; or on the ground that there has been no *bonâ fide* user during the preceding five years; unless in either case the non-user was due to special circumstances and not to an intent to abandon the trade mark.
S. 22. A trade mark when registered can be assigned and transmitted only with the goodwill of the business relating to the goods for which it is registered, and is terminable
Ss. 5, 38. with that goodwill. Subject to the provisions of the Act, the person for the time registered as proprietor has power to assign it. Notice of trusts cannot be registered but equities may be enforced in the same way as in respect of any other personal property.

Infringement.—If any person uses a trade mark or any imitation thereof which is calculated to deceive upon goods

not made by the proprietor of the trade mark, he renders himself liable to an action for an *injunction*, and, unless the infringement was innocent,[1] for *damages* or an *account of profits*. To obtain an injunction it is not necessary to prove that the infringement was fraudulent, or that anyone was in fact deceived.[2]

Trade Names.—Goods of a trader may become known in connection with his name, or that of his works or the locality of his business, although no trade mark has been registered, as, *e.g.*, "Angostura Bitters" or "Singer Machines." When a name used in this way has become known as denoting the goods of A., he acquires a right, enforceable in what is called a "passing-off" action, to prevent any other person from using the same name in connection with the same kind of goods in any way likely to induce people to believe that the goods are those of A.[3] But a rival manufacturer of the same name is entitled to use *his own name* unless he does it in such a way as to deceive the public.[4]

The right to a trade name is assignable and transmissible with the business in connection with which it is exercised.

A similar right exists to prevent a person from selling his goods as those of another by means of an imitation "get-up" which is calculated to deceive.[5] In neither case is it necessary, in order to obtain an injunction, to show that anyone was in fact deceived.

Goodwill comprises every advantage acquired by carrying on a business, whether connected with the premises or name or reputation of the business. The sale of a business carries the right to use the business name, provided that the vendors are not thereby exposed to any liability.[6] On a dissolution of partnership each partner, in the absence

[1] *Slazenger* v. *Spalding*, 1910, 1 Ch. 257.

[2] *Bourne* v. *Swan and Edgar, Ltd.*, 1903, 1 Ch. 211.

[3] *Singer, &c., Co.* v. *Long*, 8 A. C. 15; *Reddaway* v. *Banham*, 1896, A. C. 199.

[4] *Turton* v. *Turton*, 42 Ch. D. 128.

[5] *William Edge & Sons, Ltd.* v. *Niccolls & Sons, Ltd.*, 1911, A C 693.

[6] *Thynne* v. *Shove*, 45 Ch. D. 577.

of any contrary agreement, has a similar right to use the name of the old firm. The sale of a goodwill does not prevent the vendor from setting up a *similar* business, but he may not represent that it is the *same* business as that which he has sold, and he may not canvass customers of the old firm.[1]

CHAPTER X.

OF SETTLEMENTS OF PERSONAL PROPERTY.

LAND can be *settled* by giving life *estates* to some persons with *estates* in remainder to others after them. But personal property, being the subject of ownership which is absolute and indivisible, cannot be settled by the creation of estates in it. If, therefore, a chattel be assigned to A. for life, he is entitled to the whole ownership. An exception occurs in the case of a *bequest* of a term of years to A. for life, and after his decease to B. Here on A.'s death the term vests by way of **executory bequest** in B. During A.'s life B. has no estate, but merely a *possibility*, which, however, he can alienate by deed under the Real Property Act, 1845.

S. 6.

In modern times, however, if personalty was given to A. for life with remainder to B., the Ct. of Chancery considered that A. had merely a life interest and that B. had a vested interest in remainder, and it would compel A. to make good the disposition. In making a settlement of personalty, the doctrines of equity are, therefore, resorted to, and the property is vested in trustees on trust for A. for life, and after his decease on trust for B. and the other beneficiaries. The St. Uses does not apply to personalty; the trustees therefore get the legal ownership, but they must pay the interest to A. for life and after his decease to B., and so on, according to the trusts of the settlement.

Part i., Chap. VIII.

Where shares are so settled, any *bonus* (*a*), if paid as dividend, belongs to the life tenant, but, if paid or dealt with by the company as capital, it becomes subject to the

[1] *Trego* v. *Hunt*, 1896, A. C. 7.

trusts of the settlement, and only the income therefrom is paid to the life tenant.[1]

By the **Apportionment Act, 1870,** all dividends and other periodical payments in the nature of income are, in the absence of any express stipulation to the contrary, made apportionable like the interest on money lent, which was always considered as accruing from day to day: if therefore a quarterly dividend falls due one month after the death of A., his P. R. are entitled to two-thirds and B. is entitled to one-third. Before the Act apportionment was only possible in a few cases, and except in these B. would have got the whole. Part I., Chap. V.

The word "heirs" is unnecessary for and inapplicable to a gift of personalty, which is not hereditary. Nor is it necessary to add the words "executors and administrators": a gift of personalty "to A." simply, without any words of inheritance or succession, is sufficient to give him the complete ownership. So also a gift of personalty to A. and the "heirs of his body" gives him the complete ownership, since an estate tail cannot either at law or in equity exist in personalty.

Sometimes, however, personalty is settled in trust for A. for life, and *after his decease* in trust for his executors, administrators, and assigns. Where these words are used then, by analogy to the rule in *Shelley's Case*, A. is entitled to the absolute ownership. Part I., Chap. XV.

The rules governing contingent remainders on land do not apply to contingent dispositions of personalty. If therefore a gift of personalty be made in trust for A. for his life, and, after his decease, on trust for such son of A. as shall first attain 21, it is immaterial whether or not the son attains the age of 21 in the lifetime of A. Part I., Chap. XVI.

Future dispositions of personalty are, however, governed by the **perpetuity rule,** and *accumulations* of the *income* of personalty are subject to the same rules as that of realty. Part I., Chap. XVIII.

Equitable interests may be created in personalty, as in realty, by means of **powers.** Thus stock may be vested

[1] *Re Bouch*, 29 Ch. D. 635.

in trustees on such trusts as B. shall appoint, and in default of and until appointment on trust for C. Here C. has a vested interest, subject to be divested by B. exercising his power, which he may do even in favour of himself. But if B. does not exercise his power, C. is entitled absolutely.

A frequent instance of the employment of a power over personalty occurs in the case of children's **portions**, which are usually settled on all the children equally, subject to a *power* in their parents to alter the division. Formerly unless such a power was *exclusive*, *i.e.*, expressly authorized an appointment to *some* only or to *one* of the children, each must receive a substantial share or the appointment was *illusory* and void. Now by the **Illusory Appointments Act of 1830** an appointment of the smallest amount is sufficient, and by the **Powers of Appointment Act, 1874**,[1] the appointment is valid even where one is excluded altogether, unless this is forbidden by the instrument creating the power.

It is usual to provide that where part of such a fund is appointed to any child, he shall not share in any unappointed part without bringing into *hotchpot* the part appointed to him.

If a power is given to appoint, among a class of persons, any appointment to a person, not a member of the class, is void. Thus, if the power is to appoint among *children*, an appointment to grandchildren would be void. If, however, the power were to appoint among *issue*, an appointment to even remoter descendants would be valid, provided that the interest appointed must vest (if at all) within the time allowed by the perpetuity rule.

An appointment by a father in favour of his child must be made strictly for the benefit of the child. If made under any bargain which is for the benefit of the father, or any person not an object of the power, it is void as a *fraud on a power*. Thus where the *time* of appointment is left to the father it is a fraud for him to appoint to an

[1] These Acts apply both to realty and to personalty, but in practice land is seldom dealt with in this way.

infant child for the sake of being entitled to the fund on the child's death.[1]

If personalty is directed to be paid at a future time, the Court favours a construction of the instrument which will create a vested right. Thus if a legacy is given to A. to be *payable* when he attains 21, the gift is vested, and if A. dies under age is payable to his P. R.

In settling personalty on children, the usual plan is to *vest* the interests given in those only who attain 21, or, being daughters, marry under 21. Here no interest vests before 21 or marriage. In the absence therefore of any express directions in the settlement, no portion of the income could, in the meantime, be applied for the maintenance of the children, except by order of the Court, which might be obtained under some circumstances, as, *e.g.*, where the settlement was by a parent of the children or person *in loco parentis*.

Now, however, by s. 43 of the **Conveyancing Act, 1881,** whenever property is held on trust for an infant for not less than a life interest, either absolutely or contingently on his attaining 21, or the happening of any event before that time, the trustees may, unless a contrary intention is expressed in the settlement, apply the income to his maintenance unless it was in the meantime given to someone else.[2]

In settlements of personalty trustees are sometimes authorized to invest in realty. In such a case it is directed that the land purchased shall be held by the trustees on trust for sale, subject to the consent of the equitable tenants for life, during their lives. This trust for sale, according to the rules of Equity, *reconverts* the land back to personalty, so that the devolution of the trust property remains unaltered. But if the persons entitled are all *sui juris*, and all consent, they may elect that the land shall not be sold and may take it as realty.

By the **C. A. 1911,** it is provided, with respect to settle- S. 10.

[1] *Henty* v. *Wrey*, 21 Ch. D. 332. For the remaining rules applicable to powers, see Part I., Chap. XVII.

[2] *Re Bowlby*, 1904, 2 Ch. 685.

ments coming into operation after that year, that where a settlement of property as personalty contains a power to invest in land, such land shall, unless the settlement otherwise provides, be held by the trustees on trust for sale with power to postpone the sale.

The Trustee Act, 1893, applies to the appointment, retirement, and discharge of trustees of personalty, and as to the vesting of personalty in a new trustee in the same way as in the case of realty.[1] A vesting declaration is not, however, applicable to shares, stock or other property transferable only in the books of a company or other body, which must be vested in the new trustees by the ordinary methods of transfer.

In some marriage settlements a covenant is inserted for the settlement by the wife of her after-acquired property. This, unless the contrary appears, applies only to property acquired during coverture, and, in the case of reversionary interests, only to those which fall into possession during coverture.

As the M. W. P. Act, 1882, did not affect the law relating to settlements of the property of a married woman, such a covenant by the husband alone might bind any after-acquired property of the wife not expressly given to her for her separate use. But by the M. W. P. Act, 1907, such a settlement or agreement for a settlement, made *after that year* in respect of an intended wife's property, is not—except where she dies an infant—valid unless executed by the wife if of full age or confirmed by her after she attains full age.

S. 2.

A settlement made previously to and in consideration of marriage, or made after marriage in pursuance of written articles made before marriage, is for valuable consideration. But a *contract* for *future settlement* of after-acquired property may be rendered void by bankruptcy. And a *voluntary settlement* may be void under 13 *Eliz. c.* 5, or may be avoided by subsequent bankruptcy.

Ante, p. 13.

Ante, p. 12.

To create a gift or voluntary settlement of a legal chose

[1] As to this and as to the Judicial Trustee Act and the Public Trustee Act, see Part i., Chap. VIII.

in action, the settlor must either do everything necessary to effect its legal transfer to a trustee, or he must declare himself trustee for the beneficiary; if, however, the chose in action is equitable, as, *e.g.*, stock standing in the name of a trustee for the settlor, it may be settled by a *written* direction to the trustee to hold for the new beneficiary. But Equity will not enforce specific performance of a *voluntary* agreement to create a trust even though made by deed. St. Franda, s. 9, Part i., Chap. VIII.

A voluntary settlement when completed is binding on the *settlor*, unless a power of revocation has been inserted, which should always be suggested by a solicitor preparing a voluntary settlement. But the Court may set it aside if the settlor did not understand its effect.

If a trust be declared to lay out money in the purchase of land the money is in equity considered to be *converted* into real estate. If therefore money is subject to a trust for investment of land to be settled on certain limitations the money, until the land is purchased, will devolve according to those limitations.

Where land subject to a settlement is sold under a power of sale, the money arising from the sale is usually subject to a trust for its application in the purchase of land to be conveyed to the uses of the settlement. Under the **S. L. A. 1882**, the money may in such a case be invested, at the direction of the life tenant, in the securities authorized by the Act, which may be held by the trustees as a permanent investment until they are directed by a life tenant to purchase land. But the money so invested is regarded for all purposes as land and the *equitable* interest will devolve as land. Ss. 2, 21 32, 35.

Chattels may be assigned to trustees to be held on trusts corresponding, so far as is possible, with the uses declared by the settlement of the land. When so settled they are usually called **heirlooms,** but as there cannot be an estate tail in personalty, the first tenant in tail of the lands is absolutely entitled to such chattels. It is usually, however, provided that they shall not absolutely vest in any tenant in tail *by purchase* under the settlement until

S. 87. he attains 21. Under the S. L. A. 1882, such chattels may, by order of the Court, be sold by the life tenant and the money may be applied as capital money arising under the Act or invested in similar chattels.

Leaseholds may be settled in the same manner as chattels personal.

Ante, p. 33. **Alienation for Debt.**—A charging order may be made on a judgment debtor's interest of any kind in any stock or shares held for him. And, if he is entitled to the income of, or to a reversionary interest in, any personalty vested in trustees, the judgment creditor may obtain the appointment of a receiver.

Ante, p. 13.

CHAPTER XI.

OF CO-OWNERSHIP AND PARTNERSHIP.

Joint ownership may exist in personal property, and is characterized by the four *unities of possession, interest, title and time*, in the same way as joint tenancies of realty. The right of *survivorship* similarly exists so that a surviving joint owner is entitled to the whole, unaffected by the will of the other: hence trustees of settlements of personal property are always made joint owners. Where, however, two persons advance money and take a security jointly, the survivor is considered *in Equity* a trustee for the personal representatives of the deceased.

Part i., Chap. VI.

Ante, p. 51. A gift of personalty "to A. and B." simply makes them joint owners, and, in respect to all other persons, in the position of one single owner.

Joint Liability.—On the same principle, if a bond or covenant is made to two or more *jointly*, all must join in suing or being sued on it, and a release given by or to one releases all. Judgment obtained against one during their joint lives discharges the rest,[1] but judgment obtained against all jointly may be executed against all or any. After the death of one the others are liable for the whole, and, if one dies after judgment, execution is possible only

[1] *Kendall* v. *Hamilton*, 4 A. C. 504.

against the survivor. Where, however, one joint contractor becomes bankrupt the others can sue and be sued without him. Bankruptcy Act, 1883, s. 114.

If a liability is *joint and several*, each party is individually liable for the whole and may be sued separately, or all may be sued jointly. A release of one will release all unless the creditor expressly reserves his rights against the rest; the estate of one is not, however, discharged by his death.

In **ownership in common** there is only *unity of possession*, and no right of survivorship. It may arise (i.) by grant to two or more to hold in common;[1] (ii.) by severance of a joint ownership through the assignment by a joint owner of his share. A tenancy in common cannot *at law* exist in a chose in action, though it may in equity.

Partnership[2] is the relation which subsists between persons carrying on a *business* in common with a *view of profit*. Mere co-ownership is not partnership, and is in many respects different from partnership. Thus a co-owner of property can, without the consent of the others, transfer his share so as to put the assignee entirely in his own place. But one partner cannot, without the consent of the others, assign his share so as to make his assignee *a partner* in his own place; he can merely assign his interest in the partnership, *i.e.*, his share of the assets and profits. Again, where *land* has become partnership property, it is treated as between the partners as personal property, and on the death of a partner the beneficial interest in it devolves as personalty and not as realty. Partnership Act, 1890, s. 1. S. 31. S. 22.

As between partners there is *no survivorship*, the share of a deceased partner in the partnership property vests in his personal representatives; choses in action must be sued for by the surviving partner, who is a trustee of the share of the deceased partner.

The *liability* of partners during their lives is *joint* only, unless they have contracted jointly and severally. After S.

[1] In wills any words denoting an intention to give the legatees distinct interests will make them tenants in common, as, *e.g.*, a gift "to A. and B. *equally*."

[2] As to partnership generally, see A. C. T., Part iii., Chap. III.

the death of a partner his estate is severally liable, but his own *separate* creditors must be paid in full out of it before it can be applied to partnership debts. And, where a *partnership* is bankrupt, the joint assets of the firm are applicable first to the joint debts, and the separate assets of the partners to their separate debts.

Execution cannot issue against partnership property, except on a judgment against the firm. A judgment creditor of one partner may, however, obtain a *charging order* charging that partner's interest with payment of the debt, and may have a *receiver* appointed of his share of the profits.

CHAPTER XII.

OF SUCCESSION TO PERSONALTY.

(1) OF WILLS OF PERSONALTY.

Part i., Chap. XI.

AT C. L., as we have seen, the executor was entitled to all the personalty of the deceased for the purposes of administration; but on a devise of real estate the lands passed at once to the devisee and the appointment of an executor was unnecessary and inapplicable. Now, however, under the L. T. A. 1897, on the death of a man all his realty and personalty, with some few exceptions, passes to his P. R. for the purposes of administration. But there are still differences between the devolution and administration of realty and personalty.

Wills of Personalty.—At C. L. a man who had wife and children could not by his will deprive them of more than one-third of his personalty. But, if he left either a wife and no children, or children and no wife, he could dispose of half. This rule was, however, subject to exceptions by local custom. Now, by the Wills Act. 1837, every person of full age can dispose by will of all his personalty, legal or equitable.

S. 3

A will of personalty might formerly be *nuncupative*, i.e.,

made by word of mouth before sufficient witnesses. Now, however, with certain exceptions,[1] all wills must be made in accordance with the provisions of the Wills Act. Part i., Chap. XI.

Succession to personal chattels is governed by the law of the *domicile* of the deceased; succession to land—including leasehold—by the law of the country where it is situated.

Wills of **aliens** who leave personalty in England must therefore be made in accordance with the law of their domicile unless they devise land in England, when the will must be in accordance with English law.

Wills of personalty made by **British subjects** *out of* the United Kingdom may be made according to the law of the place (1) where the will was made; or (2) where the testator was domiciled; or (3) where he had his domicile of origin. If made *within* the United Kingdom they are valid if made according to the law of the part of the United Kingdom where they are made. By the same Act, no will is revoked or has its construction altered by a subsequent change of domicile. Ld. Kingsdown's Act, 1861, s. 1. s. 2. s. 3.

A *donatio mortis causâ* is a gift of pure personalty made in contemplation of death, and intended to be absolute only in case of the death of the donor. There must be an actual delivery of the gift or the means of obtaining it, *e.g.*, keys of a box, or, in case of a chose in action, of the document which evidences it, *e.g.*, a policy of insurance or a banker's deposit note. But the delivery of a cheque *drawn* by the donor is not sufficient unless it is cashed in the life of the donor.[2]

A *donatio mortis causâ* is revocable by the donor in his life, and after his death is subject to his debts and to legacy and estate duty.

[1] Soldiers on active service and sailors at sea may, though infants, make such wills of their *personal* estate as they might have made before the Act (s. 11). But the wills of seamen in the royal navy and marines, so far as they relate to wages, prize money, or any other sum payable to them in respect of service, and the wills of merchant seamen dying during a voyage, with respect to their wages or effects left on board, must be executed with special formalities.

[2] *Austin* v. *Mead*, 15 Ch. D. 651.

Probate.—A will of personalty *must* be *proved*. Probate was formerly required to be made in the ecclesiastical courts, but by the Court of Probate Act, 1857, the Ct. of Probate was created, which is now merged into the Probate, Divorce and Admiralty Division of the High Ct. Upon probate the will itself is deposited under the control of the Ct., and the probate copy, which is given to the executor, forms the only evidence of his title to administer. By the L. T. A. 1897, probate may be granted in respect of real estate, but a will of land is in itself a method of conveyance and a document of title.

S. 1.
Part i., Chap. XI.

A will may be proved in the *principal registry* of the Probate Division wherever the testator dwelt, or it may be proved in the *district registry* where he lived.

Part i., Chap. XI.

Where the attestation clause expresses that the forms of the Wills Act have been complied with and the validity of the will is not disputed, it is proved by the simple oath of the executor. But if the attestation clause is omitted, or does not express that the proper formalities were complied with, an affidavit is required from one of the attesting witnesses that the will was properly executed. Probate in either of the above modes is termed probate in **common form.**

If the validity is disputed, or likely to be disputed, the will is proved in **solemn form** *per testes*, *i.e.*, by witnesses sworn and examined, and such other evidence as may be necessary, in the presence of the widow and next of kin, and all persons pretending to have any interest, who are cited to attend.

When a will is proved in common form the executor may within 30 years be compelled to prove it in solemn form, but when once proved in solemn form it is finally established.

Ct. of Probate Act, 1857, s. 79.

A person appointed as executor may, if he has not intermeddled with the estate, decline the office and **renounce probate.** His rights then wholly cease and the administration devolves as if he had never been appointed. And under the Public Trustee Act, 1906, an executor who has obtained probate may, with the sanction of the Ct., transfer

S. 6.

the estate to the public trustee, either solely or jointly with any continuing executors.

When the will is proved it is the duty of the executor to pay the funeral and testamentary expenses and debts, and for this purpose he has full powers of disposition over the assets vesting in him. A purchaser from him is not bound to inquire if any debts remain unpaid or to see to the application of the purchase-money.

By s. 21 of the Trustee Act, 1893, an executor may pay a debt on any evidence that he thinks sufficient, and may allow time for payment, compromise, abandon, or otherwise settle any debt.

Where any questions arise as to the proper method of administration, the executor is entitled to the assistance of the Court. Formerly, he was obliged to commence a suit for administration by the Court. And such a suit might also be commenced by a creditor, or legatee, or person entitled upon an intestacy. Now an order for administration may be obtained either in an action or upon an *originating summons* taken out by an executor or administrator, or creditor, or legatee, or next of kin. And an originating summons may also be taken out by any of the above to determine any one or more questions without an administration by the Ct. R. S. C., Order LV., rr. 3, 4.

When the debts are paid[1] the **legacies** must be discharged. For this an executor is allowed one year. General legacies carry 4 per cent. interest from one year after the death. But if they are given to a legatee under 21 by a parent, or person *in loco parentis*, interest is given from the death unless there is some other provision for the maintenance of the legatee.

Even after the year an executor is liable to a creditor to the amount of the assets which have come to his hands, and he can therefore compel a legatee to refund money paid in ignorance of the debt. Where, however, an executor gives the same notices as the Court would have given in an administration action, for creditors and others to send in their claims, he may distribute the assets without being

[1] See Table, p. 25.

personally liable for any claim of which he had no notice, but the right of a creditor to follow the assets into the hands of the legatees is not prejudiced.[1]

Where a legacy is given to an infant or a person who is absent beyond seas, an executor can only obtain a discharge by paying it into Court under the Trustee Act, 1893.

S. 42.

A **specific** legacy is a bequest of a specific part of the testator's personalty, *i.e.*, some particular thing or fund (*e.g.*, *my* £100 consols). It must be paid in preference to general legacies and must not be sold for or applied to payment of debts until the general assets are exhausted. But it is liable to *ademption*, *i.e.*, the legatee will lose all benefit if the testator parts with it in his lifetime.

A **demonstrative** legacy is a gift of a certain sum *out of* a particular fund (*e.g.*, £50 *out of* my £100 consols), but if the fund has ceased to exist it is payable out of the general assets. While the fund exists it is not liable to abatement with the general legacies.

General legacies are those payable out of the general assets of the testator (*e.g.*, £100 consols), and on a deficiency of assets are liable to *abatement*.

A legacy given to a creditor is deemed to be given in satisfaction of the debt if equal to or greater than the amount of the debt; but not if it is less, or payable at a different time, or if the debt was contracted after the making of the will, or if the will contains a direction for payment of debts. The Court leans against holding a legacy to be a satisfaction of a debt.

But where a parent has undertaken to pay a sum of money to a child as a **portion** the Court leans against double portions, and inclines to consider a legacy to the child as a complete or partial *satisfaction* of the obligation to pay the portion, even though the legacy is less in amount or payable at a different time.

[1] Law of Property Amendment Act, 1859, s. 29. By ss. 27 and 28 of this Act an executor may exonerate himself from all liability in respect of rents and covenants of any property after an assignment made by him to a purchaser, provided he sets apart a sufficient sum to answer future claims in respect of any fixed sum agreed by the grantee or lessee to be laid out on the property.

So also if a parent by will makes a gift of a portion to a child and subsequently in his life makes a gift of a portion to the child, the presumption is that this is an *advancement*, or an *ademption* wholly or in part of the amount bequeathed.

If a legacy is devoted to charity, but cannot be applied exactly as the testator has directed, the Court will execute his intent *cy-pres*, *i.e.*, as nearly as possible.

The term child in a bequest does not include or apply to illegitimate children, unless (i.) the terms of the gift are such that illegitimate children could not take; or (ii.) the illegitimate children are clearly identified as the objects of the bequest; or (iii.) they have acquired the reputation of being children of the testator or any other person, and the will shows an intent to include or apply to them. But an illegitimate child begotten after the death of the testator can never take under a bequest to children.

After payment of debts and legacies, the balance must be paid to the *residuary legatee*.

Any legacy which lapses by the death of a legatee during the life of the testator or fails from being contrary to law also goes to the residuary legatee. If a bequest of residue lapses the property devolves as upon an intestacy. Before 1830, if there was no residuary legatee, the residue, unless a contrary intention was expressed, belonged to the executor. Now, by the Executors Act, 1830, in the absence of a contrary intent he is a trustee for the persons entitled under the Statute of Distributions. Part I., Chap. XI.

A legacy or share of residue due to a bankrupt will vest in his trustee in bankruptcy, but the only process of execution against such property is by the appointment of a receiver.

(2) Of Intestacy.

In early times if a man died intestate the distribution of his goods devolved on the church. After the wife and children had their shares the remainder was applied *in pios usus*. By a statute of Edward I. it was enacted that the ordinary should be bound to pay the debts out of the estate in the same manner as an executor, and that an

action might be brought against the ordinary by the creditor.

31 Edw. III. A statute of Edward III. provided that where a man died intestate, the ordinary should depute his *next and most lawful* friends to administer the estate, and gave them the same rights and liabilities as executors.

By 21 Hen. VIII. c. 5, administration might be granted to the widow or next of kin, or both. If the next of kin would not take out administration a creditor might do so, and failing creditors the Court might grant administration to anyone. The jurisdiction to grant administration is now vested in the Probate Division, or where the estate does not exceed £100 in the County Courts.

Part i., Chap. XI. The powers of an **administrator** are the same as those of an executor, and *relate back* to the time of the death. He has also the same duty of paying funeral and testamentary expenses and debts and the same powers of applying to the Court for assistance; the provisions of s. 21 of the Trustee Act and of ss. 27—29 of the Law of Property Amendment Act, 1889, also apply to administrators.

Ante, pp. 61, 62.

After payment of debts the surplus is distributed among the persons entitled according to the Statutes of Distributions. The administrator is allowed a year for making distribution, but the interest of the persons entitled vests immediately upon the death.

See also Part i., Chap. XI. **Limited administration** may be granted in some cases, *e.g.* (*a*) *durante minore ætate*, in case of the minority of the next of kin; (*b*) *durante absentia*, in the absence of an executor or of the next of kin; (*c*) *pendente lite*—when an action is pending concerning the administration.

The distribution of personalty is governed thus according to the Statutes of Distributions:—

Part i., Chap. X. (1) The **widow** takes one-third if there are children, otherwise a half. Also, under the Intestates' Estates Act, 1890, the widow may be entitled to a further £500.

Post, p. 69. The husband of a married woman is entitled to all her property, including her separate property under the Married Women's Property Acts.

Subject to the rights of the widow:

(2) **Children** and descendants of deceased children take *per stirpes*, bringing any *advancement* into hotchpot.[1]

(3) If there are no children or lineal descendants the **father** takes the whole.

(4) If the father is dead the **mother, brothers and sisters,** whether half-blood or whole blood, take in equal shares, and if either the mother or any brother or sister is alive the children (but not other descendants) of any deceased brother or sister take the share of their parents.

(5) If neither the mother nor any brother or sister is alive, the children of the brothers and sisters take *per capita*, together with the other next of kin. In tracing degrees of kindred, no preference is given to males, nor to the paternal line, nor to the whole blood, nor do issue stand in the place of their ancestor. Degrees of kindred are reckoned upwards to the common ancestor and then down, each generation being one degree, *e.g.*, from nephew to uncle is three degrees. A share taken under an intestacy may be attached by the same process of equitable execution as is available in the case of a legacy.

CHAPTER XIII.

OF THE MUTUAL RIGHTS OF HUSBAND AND WIFE.

In ancient times the wife was entitled to a provision out of the lands of her husband in case she survived him, but there was no such provision with regard to chattels, except the rule of early law that he could not bequeath more than a certain part away from her and his children.

A husband was absolutely entitled to the personal chattels of his wife, who, as a *feme covert*, was considered to be one person with her husband. The wife had no capacity to acquire or exercise rights over personalty

[1] But the heir-at-law is entitled to an equal share with the other children without taking into consideration the value of any land which he may have by descent or otherwise from the testator.

during marriage, and the husband was entitled to all personalty acquired by her which was in possession or was reduced into possession by him.

He might authorize his wife to dispose of her property by will, which was valid if he allowed it to be proved, but until probate he might revoke the authority.

He might dispose of her chattels as he pleased during his life or by his will, and they were subject to his debts. If he died intestate she had no more claim to them than to any other of his effects.

The only exceptions were **paraphernalia,** *i.e.*, apparel and ornaments suitable to her condition, and gifts of jewels, &c., made by her husband. These might be disposed of by the husband during his life, and, with the exception of necessary clothing, were subject to his debts. But he could not dispose of them by will. The wife could not dispose of them by gift or will during her husband's life.

The legal **choses in action** of the wife vested in the husband, if reduced into possession by him during coverture. If, however, he died first she became entitled by survivorship to choses in action not reduced into possession by him. If she died first, he must take out letters of administration before he could recover them, and he was bound to satisfy her debts out of them.

In the case of *equitable* choses in action, the husband could not obtain the aid of the Ct. of Chancery in recovering them unless he settled a certain proportion on the wife and children. This right of the wife was termed her **equity to a settlement.** It was a right personal to the wife, and did not survive to the children in case of her decease before the Ct. had made a decree for the settlement.

By **Malins' Act, 1857,** a wife might, with the concurrence of her husband, dispose by deed acknowledged of every future or reversionary interest in any personal estate to which she was entitled under any instrument (except her marriage settlement) made after 1857, and might also release her equity to a settlement out of her personal estate in possession under any such instrument.

This Act did not apply to any reversionary interest which she was restrained from anticipating. But now by the C. A. 1911, s. 7, the Ct. may bind any interest which she is by law unable to dispose of or bind.

If a wife had, after her engagement to marry, assigned away any of her property without the consent of her husband, the assignment was void, as a *fraud on his marital rights*.

Wife's Separate Estate in Equity.—In equity a wife might enforce a trust imposed on any person to hold personal property for her *separate use*. With respect to this separate estate, she was considered as a *feme sole*, and, unless *restrained from anticipation*, she might dispose of her equitable interest therein without her husband's concurrence, either in her life or by will. But if she died intestate in the life of her husband, he took it in his marital right if the property were in possession or as her administrator if it were in action.

Marriage Settlements.—In modern times, when it was desired to settle personalty on an intended wife this was effected by the rules of equity, which enabled interests for life and in remainder to be granted in personal property placed in the hands of trustees, and which enforced trusts for married women. The personal property was transferred to trustees on trust for investment and to pay the income for the separate use of the wife during marriage without power of anticipation.

After the determination of the coverture the income was usually given in trust for the survivor, and after death of the survivor in trust for the children in such shares as the parents or survivor should appoint, and in default of appointment in equal shares.

In default of children, any personalty settled on the part of the wife was usually given to her absolutely, if she should survive, but if the husband should survive, then on trust as she should by will appoint, and in default of appointment on trust for the next of kin.

Property settled on the part of the husband was usually limited on trust for himself for life, then to his wife for

life if she survived, with remainder to the children as above, and in default of children to the husband absolutely.

Part i., Chap. XIV.

Married Women's Property Acts.—Until 1870 a married woman could only acquire separate estate in equity. But, as we have seen, the **M. W. P. Acts, 1870 and 1882,** enabled a wife to own *legal* separate property.

S. 1.

By the **M. W. P. A. 1882** a married woman was rendered capable of making herself liable on any contract to the extent of her separate property and of suing and being sued in contract or tort as a *feme sole*.

As to liability of a married woman and of her husband, see further A. C. T., Part iii., Chap. VI.

By the **M. W. P. A. 1893** every contract entered into by a married woman *otherwise than as agent* binds all the separate property to which at the time of making the contract, or thereafter, she is entitled; *except* separate property which at that time, or thereafter, she is restrained from anticipating.[1] But she is only liable to the extent of her free separate property, not personally; execution cannot therefore issue against property which she is restrained from anticipating, nor can she be imprisoned under the Debtors Act, 1869.[2] If however she carries on any trade or business, *whether separately from her husband or not*, she may be made *bankrupt* and, in spite of any restraint on anticipation, the Ct. may order the income of her separate property to be paid to the trustee in bankruptcy. By the M. W. P. A. 1893 the Ct. has a similar power to order the *costs* of an action unsuccessfully brought by her to be paid out of restrained property.

Bankruptcy Act, 1913, s. 12.

S. 2.

By the Act of 1882 every married woman has the same civil and criminal remedies against all persons, including her husband, for the protection of her separate property as if she were a *feme sole*, but apart from this no husband or wife can sue the other for a tort. No criminal proceeding can be taken by a wife against her husband in respect of her property while they are living together, nor, while they are living apart, in respect of any act done while they were living together, unless the property was wrongfully

[1] *Barnett* v. *Howard*, 1900. 2 Q. B. 784; *Brown* v. *Dimbleby*, 1904, 1 K. B. 28.

[2] *Scott* v. *Morley*, 20 Q. B. D. 120.

taken by the husband when leaving or deserting his wife. Under the same conditions a wife is liable to criminal proceedings by her husband. M. W. P. A. 1882, s. 12.

Questions between husband and wife as to the title to or possession of property may be decided in a summary way by application or summons to a Judge of the High Court or a County Court. S. 16. S. 17.

For her ante-nuptial debts a woman is *personally* liable as a *feme sole*. But she is also liable in respect of her separate property,[1] and no restraint on anticipation attached to a settlement of her own property can have any validity against ante-nuptial debts. M. W. P. A. 1882, s. 13. S. 19.

If a wife bequeaths her separate personal property her executor takes it subject to such liabilities as she would have been bound to satisfy. And if she exercises a general power of appointment by will, the property appointed is subject to her debts.

If she dies intestate her husband's common law rights revive, and he takes her personalty subject to the liabilities. He is entitled to her chattels real and choses in possession without taking out administration, but to choses in action he must take out administration.[2]

Matrimonial causes also were formerly within the jurisdiction of the Ecclesiastical Courts, but by the Matrimonial Causes Act, 1857, were assigned to a new Court for Divorce and Matrimonial Causes, which is now merged into the Probate, Divorce and Admiralty Division of the High Court.

On a wife's application for **judicial separation** the Ct. may make an order for **alimony,** *i.e.*, an allowance to be paid by the husband, which is not assignable by the wife nor liable for her debts.

By the Act of 1857 a wife judicially separated is in the position of a *feme sole* (*a*) with regard to any property subsequently acquired by her; (*b*) for the purposes of contract and torts and suing or being sued in any civil proceeding.

[1] *Birmingham, &c. Society* v. *Lane*, 1904, 1 K. B. 35.

[2] *Surman* v. *Wharton*, 1891, 1 Q. B. 491; *Re Lambert*, 13 Ch. D. 626.

By the same Act a wife deserted by her husband may obtain a *protection order* to protect any subsequently acquired earnings or property, and is in the same position as if she had obtained a judicial separation.

Ss. 4, 5. By the Summary Jurisdiction Act, 1895, if a husband has been convicted of a serious assault on his wife, or has deserted her, or is a habitual drunkard,[1] or if she has been forced to leave him through his cruelty or neglect to maintain her, she may obtain from a Court of Summary Jurisdiction an order that she is no longer bound to cohabit with him, which has the same effect as a decree for judicial separation.

After a decree *absolute* for **divorce** the parties may marry again, and all rights which they may enjoy in each other's property cease, except those derived under a settlement. The Court may, however, on a decree for **nullity** or **divorce,** make an order varying a settlement, and it may also order the husband to secure to the wife a gross or annual sum of money or to pay a weekly or monthly sum for her maintenance. And if **divorce** or **judicial separation** takes place for the wife's adultery it may order a settlement of her property to be made for the innocent party and the children or either.

When a wife applies for **restitution of conjugal rights** the Court may order that if the decree is not complied with the husband shall make to the wife such periodical payments as may be just and may order them to be secured by the husband.

When the application is made by the husband the Court may order a settlement of the wife's property not restrained from anticipation to be made for the benefit of the husband and the children.

[1] Amendment by 2 Edw. VII. c. 28, s. 5.

CHAPTER XIV.

OF TITLE.

A PERSON who acquires goods by *original* acquisition obtains a valid title as against all the world. Where, however, the acquisition is *derivative*, the general C. L. rule is that no person can transfer a better title to property than he has himself. If, therefore, A. finds or steals a watch and sells it to B. otherwise than in market overt, however innocently B. acted, he cannot retain it against the true owner or claim to hold it until he has been repaid the price. *Ante*, p. 6.

This rule applies equally when goods are transferred by act of law: thus an executor or trustee in bankruptcy can have no greater right than the testator or bankrupt.

The following are the chief exceptions to the rule:— Sale of Goods Act, 1893, s. 22.

1. Where *goods* are sold in market overt the buyer acquires a good title provided that he buys in good faith and without notice of any defect or want of title on the part of the seller.[1] But in case of stolen goods, though not in case of goods obtained by any fraud not amounting to larceny, the property will revest in the true owner upon the conviction of the thief. s. 24.

2. Where the seller of goods has a *voidable* title, but his title has not been actually avoided at the time of the sale, the buyer acquires a good title if he buys in good faith and without notice of the seller's defect of title. s. 23.

3. By the **Factors Act, 1889,** where a *mercantile* agent is, with the consent of the owner, in possession of goods or documents of title to goods, any sale, pledge, or other disposition made by him in the ordinary course of business of a mercantile agent, to a person acting in good faith and without notice of any lack of authority, is as valid as if he had express authority. s. 2.

[1] This does not apply to the sale of horses, which is governed by special statutes.

S. 25 (1). 4. By the Sale of Goods Act the same rule applies (*a*) where a seller of goods is in possession of the goods or documents of title and disposes of them to a person who takes in good faith and without notice of the previous sale;

S. 25 (2). (*b*) where a person, having bought or agreed to buy[1] goods, and having, with the consent of the seller, possession of the goods or documents of title, disposes of them to a person who takes in good faith and without notice of any right of the original seller in respect of the goods.

Ante, p. 23. 4. The property in money and negotiable securities is acquired by a holder in due course in spite of any defect in the title of the person from whom he took it.

Bankruptcy Act, 1913, s. 15. 5. Where goods in the possession of a judgment debtor are seized in execution and sold without any claim being made the purchaser acquires a good title.

6. Where a person so acts as to induce the belief that another was owner or had power to dispose of his goods he may be *estopped* from recovering the goods from a person who has acquired them for value under such belief.

7. Where goods are in a foreign country the property in them can be acquired by any method which, by the laws of that country, confers a title valid against all the world.

Restrictive conditions, such as may be annexed in equity to land, cannot as a rule be annexed to goods. Thus, if A. sells goods to B. with a stipulation that B. shall not resell below a certain price or shall observe any other conditions, such a stipulation will not bind a purchaser from B. But, where a chattel is the subject of a patent, restrictive conditions can be annexed thereto upon its sale and will bind any subsequent purchaser who had notice of them.

Sale of Goods Act, 1893, s. 12. As to other conditions and warranties, see A. C. T., Part iii., Chap. I. **Warranty of Title.**—On any contract of sale, unless the circumstances of the contract are such as to show a different intention, there is (*a*) an implied *condition* that the seller has or will have a right to sell the goods; (*b*) an implied

[1] See *Lee* v. *Butler*, 1893, 2 Q. B. 318; *Helby* v. *Matthews*, 1895, A. C. 471.

warranty that the buyer shall have quiet possession; (*c*) an implied *warranty* that the goods are free from any undisclosed charge or incumbrance.

Statutes of Limitations.—1. Actions **ex delicto** must generally be brought within **six** years after the cause of action accrues or the removal of any disability[1] which at the time of accrual affected the party entitled to sue. But in case of *assault, battery, wounding and imprisonment* the time is *four* years, and in case of *slander* by words *per se* actionable it is *two* years. Also in actions for *damage done by a ship* or *salvage to a ship* the time is *two* years unless extended by the Ct. 21 Jac. I. c. 16, ss. 3, 7; 19 & 20 Vict. c. 97, s. 10. Maritime Conventions Act, 1911, s. 8.

2. In actions for a **simple contract debt** the time is **six** years from (*a*) the accrual of the cause of action, *or* (*b*) the removal of disabilities existing at the accrual, *or* (*c*) the return of a debtor who was beyond seas at its accrual (*x*). 21 Jac. I. c. 16, ss. 3, 7; 19 & 20 Vict. c. 97, ss. 9, 10. (*x*) 4 & 5 Anne, c. 16, s. 19.

The debt may, however, at any time be **revived** by (i.) a promise to pay or an acknowledgment from which a promise can be implied,[2] in *writing, signed by the party liable* (*y*) *or his agent* (*z*); (ii.) a part payment from which a promise to pay the balance can be implied.[3] (*y*) 9 Geo. IV. c. 14, s. 1; (*z*) 19 & 20 Vict. c. 97, s. 13.

3. In actions upon any **specialty debt** *other than those within the next paragraph* the time is **20 years** from the above periods (2 (*a*), (*b*), (*c*)) or from any part payment or acknowledgment *in writing* signed by the party liable or his agent. 3 & 4 Will. IV. c. 42; 19 & 20 Vict. c. 97, s. 10.

4. In actions for money secured by **judgment,** or by any **mortgage or charge upon any interest in land,** or for a **legacy,** the time is **12 years** (*a*) after a right to receive it accrued to any person capable of giving a discharge or (*b*) after any part payment or acknowledgment *in writing* signed by the party liable or his agent.[4] 37 & 38 Vict. c. 57, s. 8.

[1] The disabilities under 21 Jac. I. were infancy, lunacy, coverture, and the imprisonment or absence beyond seas of the creditor. The last was abolished by 19 & 20 Vict. c. 97, s. 10, and in view of the M. W. P. A. coverture is probably no longer a disability.

[2] *Re River Steamer Co.*, 6 Ch. 828.

[3] *Tippetts* v. *Heane* 1 C. M. & R. 253.

[4] Where rules (3) and (4) conflict, the latter prevails. Thus, if money

23 & 24 Vict. c. 38, s. 13.

5. In actions for a share of **personalty under an intestacy** the time is **20** years from the above periods (4) (*a*), (*b*)

3 & 4 Will. IV. c. 27, s. 42.

6. Arrears of *rent* can be recovered *by distress* for **six** years after they became due or after any acknowledgment in writing by the party liable or his agent. But in case of a lease by deed an action upon a covenant to pay rent can be brought for 20 years (under (3)).[1]

19 & 20 Vict. c. 97, s. 11.

Joint Debtors.—The absence of one joint debtor beyond seas does not prevent time from running against the others, nor does recovery of judgments against one prevent an action against another.

(*x*) 9 Geo. IV. c. 14, s. 1.

In case of *simple contracts* one joint debtor does not lose the benefit of the statutes by any acknowledgment (*x*) or part payment (*y*) made by another.

(*y*) 19 & 20 Vict. c. 97, s. 14.

In the case of *specialty* debts within (3) or (4) a written acknowledgment by one joint debtor affects all[2]; a payment by one joint debtor affects all in the case of debts within (4), but not in the case of those within (3) (*z*).

(*z*) 19 & 20 Vict. c. 97, s. 14.

On the death of a *creditor* the time continues to run without interruption if the cause of action accrued in his lifetime. But if the cause of action accrued after his death, time begins to run only from the grant of letters of administration. The death of the *debtor* does not cause the time to stop running.

These Statutes of Limitations only bar the right of action and do not extinguish the debt. An executor may therefore pay a statute-barred debt, unless it has been judicially declared to be statute-barred, or an objection has been raised in administration proceedings.

37 & 38 Vict. c. 37, s. 8.

If a testator charges his real estate with payment of his debts, the charge, even though it is in respect of simple contract debts, remains valid for 12 years, but after that becomes barred. If he creates an express trust for payment

is charged on land by a mortgage and also secured by an express covenant either on the mortgage deed (*Sutton* v. *Sutton*, 22 Ch. D. 511), or by a collateral bond (*Fearnside* v. *Flint*, 22 Ch. D. 511), the period of limitation for the personal remedy on the covenant is 12 years.

[1] *Hunter* v. *Nockolds*, 1 Mac. & G. 640.

[2] *Re Lacy*, 1907, 1 Ch. 330; *Reed* v. *Price*, 1909, 2 K. B. 724.

of his debts out of his real estate, it will also be barred in 12 years. S. 10.

When a **chose in action** is transferred from A. to B., B. should give *notice* to the person liable, *e.g.*, in case of a debt to a debtor, otherwise his rights may be defeated by A. making a subsequent assignment of the same chose in action to C., who gives notice to the debtor before B.

If the chose in action be stock standing in the name of a trustee notice should be given to him, and if more than one to all.

Until notice the chose in action remains in the apparent possession of A., and if it is a debt due to him in the course of his trade or business will on his bankruptcy pass to his trustee as being in his "reputed ownership."

The *legal* choses in action of a bankrupt vest at once in his trustee in bankruptcy, who does not, however, complete his title to the *equitable* choses in action of the bankrupt until he gives notice to the debtor and until then may be defeated by an assignment by the bankrupt. But the trustee cannot by giving notice obtain priority over an assignment made before the bankruptcy. *Ante*, p. 29

If the property is money, stock or securities in Court a *stop order* should be obtained restraining transfer or payment without notice to the assignee.

On a transfer of shares in companies notice to the company is not necessary to complete the assignment. But in case of companies registered under the Companies Act, 1908, a transfer is not usually complete at law until registered. Equitable assignments may, however, be made and in general have priority according to the date of their creation. But if an equitable assignee gets the legal title without notice of any prior equity he will have priority over a prior equitable assignee.

APPENDIX OF QUESTIONS.

[See note to Appendix of Questions on Real Property.]

1. What were the differences between the actions of trespass, detinue and replevin?

2. What is a chose in action? How may (*a*) a legal, (*b*) an equitable, chose in action be assigned?

3. What is the difference between property and possession? Has a mere possessor of goods any rights in respect of the goods?

4. What is a bailment? If goods in the hands of a bailee are destroyed or damaged by a stranger, what are the rights and liabilities of the bailor and bailee?

5. What is a lien? Under what circumstances does a general lien exist?

6. How can a valid gift of chattels be effected?

7. What is the difference between a mortgage and a pledge of goods?

8. How may the property in chattels be transferred in equity?

9. Under what circumstances can chattels be seized in the lifetime of their owner in order to satisfy a debtor?

10. Under what circumstances can a conveyance of property be set aside as fraudulent?

11. What is a maritime lien and how does it arise?

12. What are fixtures? When can fixtures set up by a tenant for years be removed by him?

13. How far is it true at the present day to say "*Actio personalis moritur cum persona*"?

14. A. agrees to build a house for B. and undertakes to pay £20 a week "as and for liquidated damages" if the house is not completed within 12 months. Discuss the effect of this undertaking.

15. In what order must debts be paid in the administration of a deceased person's estate by his personal representatives out of Court?

16. Under what circumstances can interest on debts be recovered?

17. How can debts owing to a person be attached to answer a judgment against him?

18. Explain the expressions (*a*) accord and satisfaction; (*b*) set-off.

19. What is the effect of an adjudication in bankruptcy upon (*a*) the property of the debtor; (*b*) the rights of his creditors?

20. Is there any property *not* belonging to a bankrupt at pass to his trustee in bankruptcy?

21. What rights of distraint has a landlord on the bankruptcy of his tenant?

22. What is meant by the "relation back" of the title of the trustee in bankruptcy, and what is its effect?

23. Are there any liabilities from which a bankrupt is not released by a discharge?

24. Under what circumstances can an insolvent person enter into a private composition with his creditors without any proceedings in bankruptcy? Can such a composition bind any creditors who have not assented to it?

25. What is a personal annuity? To what class of property does it belong?

26. What is a corporation? What are the different classes of corporations?

27. Distinguish between the Memorandum and Articles of Association of a company.

28. To what extent is a past member of a company liable for its debts?

29. What is a patent? To whom and in respect of what can it be granted?

30. Sketch the proceedings that must be taken in order to obtain a patent.

31. Under what circumstances can a patent be revoked?

32. What are the remedies for infringement of a patent?

33. What is the nature of copyright in literary and dramatic works? By what facts is it conferred?

34. What is the nature of copyright in a design, and what remedies exist for its infringement?

35. What is a trade mark? Is there any property in a trade mark? Can it be assigned?

36. What is a trade name? Can a person have an exclusive right to the use of a name in connection with goods?

37. A. sells his business to B. and immediately starts a similar business in the same street; has B. any remedy?

38. Can personal property be given to A. for life, and after A.'s death to B.?

39. Explain the expressions (*a*) illusory appointment; (*b*) exclusive appointment.

40. What statutory powers have trustees in relation to the application of trust funds for the maintenance of infant beneficiaries?

41. In what ways can a trustee obtain the assistance of the Court if difficulties arise in the administration of a trust?

42. What are the principal differences between joint ownership and ownership in common of personal property?

43. What are the chief differences between joint ownership of land or chattels and partnership?

44. Explain the distinctions between joint liability and joint and several liability.

45. What are the chief differences between a partnership and an incorporated company?

46. What is a debenture? What is the effect of a floating charge created by a debenture?

47. What is a *donatio mortis causa?* How does it differ from or resemble a legacy?

48. Explain the expressions (*a*) probate in common form; (*b*) probate in solemn form.

49. Explain the differences between specific, demonstrative, and general legacies.

50. What are the rules applicable to the satisfaction of (*a*) debts by legacies; (*b*) portions by legacies?

51. How may a will of personalty be made by a British subject out of the United Kingdom?

52. What are the chief differences between a will of realty and a will of personalty?

53. What are the rules governing the distribution of the personal estate of a person who dies intestate?

54. Show how the common law rights of a husband in his wife's personal property have been altered by statute.

55. In what respects does the liability of a married woman on her contracts differ from that of a man?

56. What powers has the Court on a decree for nullity or dissolution of marriage to compel a husband to make provision for his wife?

57. Within what time must an action be brought for (*a*) a simple contract debt; (*b*) a specialty debt; (*c*) conversion? Can the time under any circumstances be extended?

58. Under what circumstances can a man confer a better title to goods than he has himself?

59. Can restrictive conditions be attached to goods?

60. Are there any implied warranties of title in a contract of sale of goods?